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REPORTS

OF

CASES

ADJUDGED IN

THE SUPREME COURT

OF

PENNSYLVANIA.

BY

WILLIAM RAWLE, JUN.

WITH NOTES REFERRING TO CASES IN THE SUBSEQUENT REPORTS.

BY

WILLIAM WYNNE WISTER, JUN.,

CONTINUED BY

ELLIS AMES BALLARD.

VOL. I.

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JUDGES

OF THE

SUPREME COURT OF PENNSYLVANIA.

JOHN BANNISTER GIBSON,	Chief Justice.
MOLTON C. ROGERS,	} Justices.
CHARLES HUSTON,	
JOHN TOD,	
FREDERICK SMITH, (appointed the 31st of January, 1828, in the place of THOMAS DUNCAN, Esq., deceased,)	

AMOS ELLMAKER, Esq., Attorney-General (appointed May, 1828.)

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PREFACE.

MR. WISTER's edition of Rawle's Reports, which appeared in 1869, contained the annotations down to 5 P. F. Smith. The present editor has followed the cases through the subsequent reports, including 7 Outerbridge and 14 Weekly Notes of Cases, and has added short notes where the importance of the subject or the subsequent course of the law has made it advisable.

MARCH, 1885.

TABLE OF CASES.

[References are to the top paging.]

A.	PAGE		PAGE
Adams v. Pennsylvania Insurance Company,	97	Cordova, Cope v.	203
Adlum v. Yard,	163	Crawford v. Jackson,	427
Allen, Stoddart v.	258		
Anderson, Freytag v.	73	D.	
Appeal of John Torr,	76	Davis v. Shoemaker,	135
Arnold v. Gorr,	223	Diechman v. Northampton Bank,	54
Ash, Biddle's Executors v.	78	Dolan, Lancaster v.	231
Aurand, The Commonwealth v.	282	Dowdel, Hartman v.	279
		Duffield v. Brindley,	91
		Dysinger, Brown v.	408
B.			
Bank of Pennsylvania v. Winger,	295	E.	
Barnet v. Ihrie,	44	Eberle v. Mayer,	366
Barton v. Smith,	403	Edmiston, Mevay v.	457
Benedict, M'Clay v.	424	Ehrenzeller v. The Union Canal Company,	181
Biddle's Executors v. Ash,	78	Elliott v. Walker,	126
Bolin v. Huffnagle,	9		
Bonsall's Appeal, Case of,	266	F.	
Boraef, Farmers' and Mechanics' Bank v.	152	Farmers' and Mechanics' Bank v. Boraef,	152
Brenneman, The Commonwealth v.	311	Felton, Langer v.	141
Brindley, Duffield v.	91	Ferguson, Otty v.	294
Brown v. Dysinger,	408	Fisher, Kalbach v.	323
Browne, Floyd v.	121	Fisher, Mechanics' Bank v.	341
Brown, Milliken v.	391	Fisher, Pastorius v.	27
Brubaker, Roop v.	304	Fisher, Streaper v.	155
Butz v. Ihrie,	218	Floyd v. Browne,	121
		Fox v. Wood,	143
C.		Freytag v. Anderson,	73
Caldwell v. Stileman,	212		
Caldwell v. Thompson,	370	G.	
Campbell, Innis v.	373	Geiger v. Welsh,	349
Carr, Williams v.	420	Gibson v. Todd,	452
Case of Bonsall's Appeal,	266	Gonzalus v. Liggitt,	426
Cheever and Fales v. Walker,	126	Gorr, Arnold v.	223
Clarkson, The Commonwealth v.	291	Griffith v. Reford,	196
Collam v. Hocker,	108		
Commonwealth v. Aurand,	282	H.	
v. Brenneman,	311	Hartman v. Dowdel,	279
v. Clarkson,	291	Hocker, Collam v.	108
v. Conard,	249	Huffnagle, Bolin v.	9
v. Leeds,	191		
M'Lenachan v.	357	I.	
Simmons v.	142	Ihrie, Barnet v.	44
v. West,	29	Ihrie, Butz v.	218
Conard, The Commonwealth v.	249	Innis v. Campbell,	373
Cooke v. Reinhart,	317	Ives, Philips v.	36
Cope v. Cordova,	203		

J.		PAGE			PAGE
Jackson, Crawford v.		427	Reinhart, Cooke v.		317
K.			Reitenbach v. Reitenbach, . . .		362
Kalbach v. Fisher,		323	Rickert v. Madeira,		325
Kershaw v. Supplee,		131	Ripple v. Ripple,		386
Kessler v. M'Conachy,		435	Roop v. Brubacker,		304
L.			S.		
Lancaster v. Dolan,		231	Seitzinger v. Weaver,		377
Langer v. Felton,		141	Shields v. Owens,		61
Leeds, The Commonwealth v. . .		191	Shoemaker, Davis v.		135
Lee v. Wright,		149	Shoemaker's Petition,		89
Libenguth, Moser v.		255	Simmons v. Commonwealth, . . .		142
Liggitt, Gonzalus v.		426	Smith, Barton v.		403
Lightner, Wike v.		289	Smull v. Mickley,		95
M.			Stileman, Caldwell v.		212
Madeira, Rickert v.		325	Stoddart v. Allen,		258
Mayer, Eberle v.		366	Streaper v. Fisher,		155
M'Clay v. Benedict,		424	Strickland, Wilbur v.		458
M'Conachy, Kessler v.		435	Supplee, Kershaw v.		131
M'Iroy v. M'Iroy,		433	T.		
M'Lenahan, The Commonwealth v.		357	Thomas v. Thomas,		112
Mechanics' Bank v. Fisher, . . .		341	Thompson, Caldwell v.		370
Metzgar v. Metzgar,		227	Todd, Gibson v.		452
Mevay v. Edmiston,		457	Torr's Appeal,		76
Mickley, Smull v.		95	U.		
Middletown and Harrisburg Turn-			Unger v. Wiggins,		331
pike Road Company v. Watson, . .		330	Union Canal Company, Ehrenzel-		
Milliken v. Brown,		391	ler v.		181
Moser v. Libenguth,		255	W.		
Myers v. White,		353	Walker, Cheever and Fales v. . .		126
N.			Walker, Elliott v.		126
Northampton Bank, Diechman v. .		54	Watson, The Middleton and Har-		
O.			risburg Turnpike Road Com-		
Otty v. Ferguson,		294	pany v.		330
Owens, Shields v.		61	Weaver, Seitzinger v.		377
P.			Welsh, Geiger v.		349
Parker, Willard v.		448	West, Commonwealth v.		29
Pastorius v. Fisher,		27	White, Myers v.		353
Pennsylvania Insurance Company,			Wiggins, Unger v.		331
Adams v.		97	Wike v. Lightner,		289
Petition of Henry Shoemaker, . .		89	Wilbur v. Strickland,		458
Philadelphia Bank, Rham v. . . .		335	Willard v. Parker,		448
Philips v. Ives,		36	Williams v. Carr,		420
R.			Winger, The Bank of Pennsylva-		
Rham v. The Philadelphia Bank, . .		335	nia v.		295
Redford, Griffith v.		196	Wood, Fox v.		143
			Wright, Lee v.		149
			Y.		
			Yard, Adlum v.		163



CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

EASTERN DISTRICT—DECEMBER TERM, 1823.

[PHILADELPHIA, DECEMBER 29, 1823.]

Bolin and Others *against* Huffnagle, Assignee, &c.

If goods are shipped on credit, in a foreign port, on board the consignee's own ship, the master of which signs a bill of lading, by which they are to be delivered to his owner, the *transitus* is at an end by delivery to the master; and the consignor cannot afterwards stop the goods, in case of the insolvency of the consignee before their arrival.

THIS was an action of replevin brought in this court by Messrs. Bolin, Leach, and Gatewood, against Huffnagle, assignee of Messrs. Sperry and Stansbury, for a quantity of wines and raisins. The following case was stated for the opinion of the court :

In September, 1822, the plaintiffs, in pursuance of an order from Messrs. Sperry and Stansbury, dated the 15th of July, 1822, shipped at Malaga in Spain, on board the brig *Pleiades*, then belonging to the said Sperry and Stansbury, and commanded by Charles King, master, in their employment, certain Malaga wines and raisins, consigned to the said Sperry and Stansbury, merchants, at Philadelphia. On the 31st of October, in the same year, before the said vessel arrived at Philadelphia, and before any intelligence was received of the said shipment, the said Sperry and Stansbury became insolvent, and executed a general assignment to the defendant, for the benefit of their creditors. On the 28th of November, in the same year, the

[Bolin and others v. Huffnagle, Assignee, &c.]

said vessel arrived in the Delaware, and on that day was detained at Newcastle, in the state of Delaware, by the service of a writ of replevin, at the suit of the plaintiffs, of which the defendant and Sperry and Stansbury, had notice at Philadelphia; and the said Captain King was notified by R. Gatewood, one of [*10] the plaintiffs, not to deliver the goods. It *was then agreed, that the said wine and raisins should be sold under the direction of both parties, and the net proceeds of sale deposited in bank to the credit of the respective attorneys, to await the decision of the question, whether the said property and the proceeds thereof belong to the said plaintiffs or to the said defendant? The net proceeds of the said wine and raisins have accordingly been deposited in bank to the credit, &c.; and it is agreed that the court shall enter judgment for the party whom they shall consider to be entitled to said proceeds.

The order referred to in the case stated, was as follows:

“PHILADELPHIA, *July 15th*, 1822.

“Malaga.

“Messrs. Bolin, Leach, and Gatewood.

“Gentlemen:

“Your Mr. Gatewood, we have had the pleasure to see, and received his assurance of your exertions to procure a freight for our brig, should she proceed to Malaga.

“We should prefer a freight to any part of the United States, not farther east than New York, or south than Norfolk; but, if a good freight offers for New Orleans, we have no objections. If direct to Philadelphia, we have no objections, as we informed your partner, Mr. Gatewood, to receive on our account to the extent of about three thousand dollars, in first quality dry Malaga wine, cask raisins, and bloom raisins, an equal proportion of each, for which we will accept your draft in his favour at four months' sight.

“We remain &c.,

(Signed)

“SPERRY and STANSBURY.”

The following is an abstract of the bill of lading:

“S. S. Shipped by Bolin, Leach, and Gatewood, in and upon the *Pleiades*, Charles King, master, now in the mole of Malaga, bound to Philadelphia,

50 qr. casks Malaga wine, &c., &c.

to be delivered at the port of Philadelphia, unto Messrs. Sperry and Stansbury, or to their assignees, they paying freight for the said goods nothing, being the owners of the said vessel.

“Dated in Malaga, the 23d of September, 1822.

(Signed)

“CHARLES KING.”

[Bolin and others v. Huffnagle, Assignee, &c.]

Abstract of the invoice :

"Invoice of raisins shipped on board the brig *Pleiades*, Charles King, master, bound to Philadelphia, by order of Horatio Sprague, Esq., for account of risk of Messrs. Sperry and Stansbury of Philadelphia.

"S. S. 100 casks of sun raisins, &c., &c.

(Signed)

"MALAGA, September 22, 1822.

"BOLIN, LEACH, and GATEWOOD."

**Dunlap*, for the plaintiffs.—The insolvency of Messrs. Sperry and Stansbury, before the goods purchased by [*11] them came into their possession, gave to the plaintiffs a right to stop them *in transitu*. This right, founded on principles of natural justice, was at an early period established in equity. It was adopted so long ago as 1690, in the case of *Wiseman v. Vandeput*, 2 Vern. 203, which in its general principles has never been departed from. *Snee v. Prescott*, 1 Atk. 245, decided in the year 1743, is a leading case; in which Lord Hardwicke established the rule, that the vendor might resume the possession of goods consigned to the vendee, before delivery, in case of the bankruptcy of the vendee: and in 1761, in *D'Aquila v. Lambert*, Ambler, 399, the rule was again adopted; and Lord Northington declared, that it has been determined on the most solid reasons, that the goods of one man ought not to be applied to the payment of another man's debts. This doctrine, originally derived from equity, is now fully established at law, as will be found in *Abbott on Shipping* (Story's Ed.) Part 3, Ch. 9, where the cases are collected, and their principles explained. In such cases the question always is, whether or not the transit is ended; for until it be ended, the vendor's right to stop the goods continues. The result of all the decisions, from 1690 down to the present day is, that nothing short of actual possession by the vendee, will divest the unpaid vendor of his right to reclaim the goods. Even delivery to a carrier, or warehouseman, or a packer appointed by a consignee, or a wharfinger who receives them on the part of the consignee, to be forwarded to him, leaves the property subject to this right of the consignor; nor is it affected by part payment of the price. *Hodgson v. Loy*, 7 T. R. 440; *Fiese v. Wray*, 3 East, 93; *Oppenheim v. Russell*, 3 Bos. & Pull. 42; *Stokes v. La Riviere*, and *Hunter v. Beal*, cited in 3 T. R. 466. In the latter of these cases Lord Mansfield was clearly of opinion, that although the goods might be legally delivered to the vendee for many purposes, yet for this purpose, there must be an absolute, actual possession; they must come to the corporate touch of the vendee, otherwise they may be stopped *in transitu*: delivery to a third person, to be conveyed to him, is

[Bolin and others v. Huffnagle, Assignee, &c.]

not sufficient. It is true that in *Ellis v. Hunt*, 3 T. R. 464, the transit was considered as ended before actual delivery; but the goods had arrived in London, and been marked with the consignee's private mark; which made it the strongest possible case of constructive delivery. The general principles of the doctrine, as previously established, were, however, fully supported by the unanimous opinion of the judges. The case of *Boehtlinck v. Inglis*, 3 East, 381, is much in point. There, a ship was chartered for a voyage to Russia, and goods were shipped on account, and at the risk of the freighter, to whom bills of lading and invoices of the cargo were sent; and it was held that delivery on board a ship thus chartered, did not divest the consignor of his right to [*12] stop the goods on their way to the vendee, *in case of his insolvency at any time before actual delivery, any more than if they had been delivered on board a general ship for the same purpose. But the very question now under consideration was determined in *Stubbs v. Lund*, 7 Mass. Rep. 453, by Chief Justice Parsons, who decided that where a merchant, in pursuance of a previous general agreement, had shipped goods on credit to one, who, after the shipment became insolvent, the shipper had a right to stop the goods *in transitu*. The right of stopping *in transitu*, goods shipped on the credit and at the risk of the consignee, continues, according to that case, until they come into his actual possession, at the end of the voyage, unless he has previously sold them and assigned the bill of lading to the purchaser. This doctrine was considered as applicable, as well to the case of a ship hired or owned by the consignee, as to that of a general ship, wherever the actual possession of the goods by the consignee is provided for by the bill of lading. If, however, the goods are shipped for a foreign market, and are not to be transported to the consignee, the right to stop *in transitu* ceases on the shipment. In *Ilsley v. Stubbs*, 9 Mass. Rep. 65, the doctrine of stoppage *in transitu* again came under the consideration of the court, when the principles laid down by Chief Justice Parsons in the case just cited, were adopted and enforced by Sewall, J. And in *Scholfield v. Bell*, 14 Mass. Rep. 40, Parker, C. J., declares, that the consignor may at any time before the actual delivery of the goods according to their destination, rescind the contract, and resume the property, in prejudice of any creditor of the consignee, and even against assignees in the case of bankruptcy.

Lowber and Binney, for the defendants.

That there is no doctrine more artificial than that of stoppage *in transitu*, is proved by the inconsistencies into which the courts have fallen in relation to it, and the conflict of opinion in respect to its origin. Those who have thought most upon the

[Bolin and others v. Huffnagle, Assignee, &c.]

subject, have had the greatest difficulty in discovering the source from which it sprang. Some have referred it to equity, others to law, while Lord Hardwicke put it upon neither equity nor law, but the custom of merchants; and if such a mind as his was perplexed with the doctrine, as it appears to have been in the case of *Snee v. Prescott*, 1 Atk. 245, it must have been because no good reason could be found at the bottom of it. Its origin is to be traced, rather to a supposed feeling of natural justice, than to any legal source. But even upon this foundation, it cannot be supported; for whatever may be the impulse in favor of one who has parted with his goods, without having received the price of them, a disciplined and reflecting mind, can perceive no more justice in protecting the rights of him whose goods are on their way to the vendee, than of him, whose property has come into his possession. In point of natural justice, they stand upon equal ground. Both have parted with their goods on the credit of the vendee, and both remain unpaid. But, whatever may [*13] *have been the origin of the rule, and however doubtful its equity, it cannot be denied that such a rule does exist; though it has been thought by at least one learned judge, Sir Alan Chambre, (4 Bos. & Pull. 72,) to have been already carried far enough.

The only question is, whether the *transitus* was ended by the delivery of the goods in question, on board the *Pleiades* at Gibraltar, or continued until her arrival at Philadelphia; and to determine this question in favor of the defendant, two propositions must be established.

1. That the *transitus* is at an end whenever the goods are delivered to the special agent of the consignee.

2. That the master of the consignee's own ship, is such an agent.

1. The continuance of the right of stoppage *in transitu*, is limited to the period during which the goods are in the hands of a mere middle man, the agent of both parties, while on their way to the vendee, or to some person or place specially appointed by him. The same person may be either a middle man, or the special agent of the vendee. It is his character in relation to the particular transaction, which determines the vendor's right to reclaim the goods. The vendor himself may be such special agent, and hold the property for the use of the vendee, as was the case in *Barrett v. Goddard*, 3 Mason, 107. The idea expressed by Lord Mansfield, in which he at first seems to have been supported by Lord Kenyon, that the corporal touch of the vendee was necessary to put an end to the transit, has never been adhered to. It is regarded as a figurative expression, the use of which has frequently been regretted. Lawes on Charter Parties,

[Bolin and others v. Huffnagle, Assignee, &c.]

493. There are many cases which illustrate the position contended for. Delivery to a packer, as a middle man, it has been held, does not terminate the *transitus*. Hunt v. Ward, cited in Ellis v. Hunt, 3 D. & E. 467. But it is terminated by delivery to a packer, in whose hands the goods are subject to the control of the vendee. Leeds v. Wright, 3 Bos. & Pull. 320. The same principle governed the case of Scott v. Pettit, 3 Bos. & Pull. 469. So, if goods be delivered to a wharfinger, who is a middle man, the consignor may stop them before they reach the consignee. Mills v. Ball, 2 Bos. & Pull. 457. But if a man be in the habit of using the warehouse of a wharfinger, as his own, and make that the depository of his goods, and dispose of them there, it seems that the *transitus* ceases when they arrive at such warehouses. Richardson v. Goss, 3 Bos. & Pull. 119. The same distinction will be found in Hurry v. Mangles, 1 Campb. 452; Harman v. Anderson, 2 Campb. 243; and Oppenheim v. Russell, 3 Bos. & Pull. 42. The slightest circumstances have been considered sufficient to put an end to the right. Such as marking the goods. Ellis v. Hunt, 3 D. & E. 464; or weighing them. Hammond v. Anderson, 4 Bos. & Pull. 69; or [*14] taking samples. Wright v. Lawes, 4 Esp. 82. *"If any thing remains to be done, on the part of the seller as between him and the buyer," says Lord Ellenborough in Hanson v. Meyer, 6 East, 629, "before the commodity purchased is to be delivered, a complete present right of property has not attached in the buyer; and this action, (trover for the goods by the assignees of the vendee,) which is accommodated to, and depends upon such supposed perfect right of property, is not maintainable." The converse of the proposition is, of course, also true. This rule has been the criterion of the subsequent decisions on this subject. The right to stop the goods does not continue until they reach the residence of the consignee, or the place to which he destines them. It ceases when they have reached the destination agreed upon between him and the vendor, though they have not reached their ultimate destination. Dixon v. Baldwin, 5 East, 175. It is, in some cases, at an end, even where the property remains in the hands of the vendor himself, as in the case already cited, of Barrett v. Goddard, 3 Mason, 107, where the goods were sold on credit, and by agreement with the vendor, they remained in his stores until the vendee became insolvent; and that of Elmore v. Stone, 1 Taunt. 458, where the purchaser agreed to give a certain price for a pair of horses, upon which the seller, who was a livery stable keeper, and dealt in horses, removed them from his sale stable to another stable. In both these cases it was determined, that the absolute property had vested in the buyer. All these cases establish the

[Bolin and others v. Huffnagle, Assignee, &c.]

principle, that whenever the goods come into the hands of the particular agent of the vendee, and there is no longer any privity between him and the vendor, the right to reclaim them is gone.

2. Was the delivery on board the consignee's own ship, to his own master, a delivery to himself? It is precisely the same as a delivery at the vendee's warehouse, which, it has been seen, terminates the *transitus*. There was, in this case, no privity between the consignor and the master, nor had the former the slightest control over the latter. The master was amenable to, and subject to the orders of the consignee alone. He was his servant. All the elementary writers concur in this. Abbot on Shipping, 361, 362; Holt on Shipping, 210, 211; Lawes on Charter Parties, 532, 534. This doctrine has been carried farther than it is now necessary to contend for. In *Fowler v. M'Taggart*, cited in 1 East, 522, it was decided, that delivery on board a vessel, chartered by the consignee for three years, was a delivery to the consignee himself. This principle was fully recognized in *Inglis v. Usherwood*, 1 East, 515; but, as in that case the delivery was on board such a ship in Russia, by the laws of which country, the owner of the goods had a right, on the bankruptcy of the vendee, to take back his goods, it was determined, that the assignees of the vendee, who had become bankrupt before the arrival of the ship home, were not entitled to them. In these cases, the principle that a ship chartered *for a term of years, is constructively the ship of the [*15] charterer, was fully established; though the latter case was taken out of it by the Russian ordinance. The case is much stronger, where, as in the present instance, the vessel is the actual property of the consignee. Lord Kenyon, in *Boehtlinck v. Schneider*, 3 Esp. 58, considered delivery on board a ship chartered merely for the voyage, sufficient to divest the right to stop the goods. But that case has been overruled by *Boehtlinck v. Inglis*, 3 East, 381, and the distinction is now well settled between a vessel chartered for a term, and one chartered for the voyage. *Mercardier v. Chesapeake Ins. Co.*, 8 Cranch, 39; *Phill. on Ins.* 242. In *Stubbs v. Lund*, 7 Mass. R. 453, cited on the other side, Chief Justice Parsons, who was more distinguished as a common, than as a commercial lawyer, departed from the landmarks previously set; added to which, the circumstances of the case showed an assent to the stoppage. There is nothing in the cases previously decided, like the distinction taken by that learned judge, between a shipment of goods, to be delivered to the consignee, and one of goods to be delivered at a foreign port. There is neither authority nor principle for such a distinction. *Stubbs v. Lund* was the guide to the subsequent decision of *Ilsley v. Stubbs*, 9 Mass. R. 65, by

[Bolin and others v. Huffnagle, Assignee, &c.]

Sewall, J., who, besides, states that the goods were under the control of the consignors at the time they were stopped. If in the case of *Coates v. Railton*, 6 Barnw. & Cressw. 422, it was intended to say, that where goods come into the hands of the vendee, whose intention it is to send them to a foreign port, the vendor may stop them, it is going too far. But, if it was only meant, that the right continues until their arrival at their ulterior place of destination, where that destination has been agreed upon between the vendor and vendee, it was right. The case professes to be in accordance with previous decisions, which if more than the latter position was intended, it departs from.

Chauncey in reply.—The question now under consideration has never been directly decided, except, perhaps, in Massachusetts. The circumstances of the case are, that the owners of a ship in Philadelphia, addressing themselves to their correspondents in a foreign port, where the ship is, declare their willingness to receive goods to a certain amount, on their own account, provided a freight to Philadelphia can be procured, and state that they will accept a draft in favour of one of the partners of the foreign house, in payment. The goods are shipped, but before their arrival, the consignees become insolvent, and the consignors claim the right to have their goods back again. If there be any value in the principle of stoppage *in transitu*, it must be available in this case, which is that of taking the goods of Messrs. Bolin, Leach, and Gatewood, to pay the debts of Messrs. Sperry and Stansbury. The doctrine of stoppage *in transitu*, is reasonable, because it is founded in honesty. The extension of commerce required its introduction. It is derived, not from the common, but the civil law, though the latter extends it to all cases in which the price remains unpaid. It [*16] is *at variance with some principles of the common law, and therefore is supposed to have been derived from equity. But whatever may have been its origin, it is now fully established as a legal doctrine. The great object is to secure the interest of a vendor who has sold goods on the faith of the solvency of a distant vendee, who becomes insolvent before they reach him. Some ambiguity has arisen from confounding the doctrine of stoppage *in transitu*, with that of lien. They are, however, distinct doctrines. The former takes place, where the title and possession have passed from the vendor, and is founded on the right to resume the goods before they reach the vendee. The latter can only exist while the property remains in the possession of the party who asserts the lien. The class of cases, therefore, which has been cited, establishing the position, that where everything has been done between the vendor and vendee, such as weighing,

[Bolin and others v. Huffnagle, Assignee, &c.]

marking, &c., the vendor cannot retain the goods on the insolvency of the vendee, belongs to the doctrine of liens, and is inapplicable to the point under discussion. Such was the case in 3 Mason, 109. Lord Mansfield has said, that to divest the right of stoppage, the goods must come to the corporal touch of the consignee. In this he was followed by Lord Kenyon, who, it is true, afterwards regretted the expression; but it has been declared again and again by different judges, that the right is divested only by actual possession. This language, however, is perhaps rather too strong, as there are cases in which constructive possession has been held to terminate the transit. The right of stoppage exists in all cases where the goods are delivered to any one to be delivered to the vendee, and while they are in transit to him. It does not cease until they reach him, or are subject to his control. If they are *in transitu*, it does not matter in what vehicle of conveyance, or in whose hands as servant or agent they may be. The term middle man does not signify a person representing both interests. Such an agent cannot represent the vendor. The master of a general ship, which is undisputed ground, does not represent the consignor. There is no privity between them. Nor does a packer, a wharfinger, or a carrier represent both parties. Nothing more is meant by the term middle man, than that he is the channel of transportation, in whose possession the goods may be stopped. The object of the delivery to an agent, and not the character of the agent, is the criterion. Where the goods are delivered for transportation, the right continues though the agent be a special one; but where they are delivered to special agent to exercise dominion over and to dispose of them, the case is different. This view of the subject reconciles all the seemingly contradictory cases. There is no case in the books of a delivery on board the consignee's own ship, but the principle contended for is applicable to such a case. It is admitted in the opposite argument, that delivery on board a general ship or one chartered for the voyage, does not prevent the consignor from resuming the property; but it has been held in *Fowler v. M'Taggart* that he cannot do so, after a delivery on board a ship char- [*17] tered for three years. This is a solitary case which cannot countervail the principles established by various other decisions. Besides, there were peculiar circumstances in that case. The goods were delivered on board to be sent abroad to merchandize. They were under the control of the vendee, and therefore as much in his possession as if they had been deposited in his own warehouse. There is a wide difference between that case and the one under consideration. Messrs. Sperry and Stansbury agreed to receive on their own account the wine and

[Bolin and others v. Huffnagle, Assignee, &c.]

raisins, provided the ship should proceed directly to Philadelphia. The object of the delivery on board was transportation to Philadelphia. The master who received the goods was an agent for that purpose merely, and had no control over them whatever. This principle served as the guide of Chief Justice Parsons in *Stubbs v. Lund*, the authority of which has been upheld by subsequent decisions of the same court. And this is not the first time that a question of commercial law, after having been beaten about for years in Westminster Hall, has in this country found its true principle, which has afterwards been recognized by English courts.

The opinion of the court was delivered by

ROGERS, J.—The facts on which the question arises are particularly set forth in the case stated. It is agreed, that unless the plaintiffs, under the circumstances, had a right of stoppage *in transitu*, the assignee is entitled to the money. Without entering into a general discussion of the law of stoppage *in transitu*, it may be sufficient to observe, as a preliminary remark, that as between the original consignor and consignee, it is now clear, that the consignee has a right to seize the goods in their transit or passage from the consignor to the consignee, if the consignee before they are delivered, becomes insolvent.

This right is now well established by law; although the extent of the doctrine has been a matter of frequent discussion, and some difficulty.

The general right being admitted, the inquiry will be, whether this case comes within the principles of the judicial adjudications. To whatever principles the right of stoppage *in transitu* be referred, it is plain, that if the goods be once actually delivered into the possession of the consignee or purchaser, the property is thereby absolutely vested in him. It is the same if the delivery be to his servant or correspondent authorized by him to receive the goods; for the possession of either of them is, in law, a delivery to the consignee himself. The question always is, whether the party to whom the goods actually came be an agent, so far representing his principal, as to make the delivery to him a full, effectual, and final delivery to the principal, as contra-distinguished from a delivery to a person virtually [*18] acting as a carrier, or mean of conveyance to, or on account of the principal, in a mere course of transit towards him. *Dixon v. Baldwin*, 5 East, 184; *Lawes on Charter Parties*, ch. 3, 492; *Brown's Law of Sales*, 451; 4 Esp. 243; *Leeds v. Wright*.

If these principles be fairly deducible from the cases, and that they are is abundantly plain, from the instances I have

[Bolin and others v. Huffnagle, Assignee, &c.]

cited, then this, independently of some cases which the industry of counsel has pressed into their service, may be considered as a question of easy solution. The relation of the master is that of a special agent to his employer. He so far represents his principal, as to make a delivery to him, (in the absence of a special agreement to the contrary,) a full, effectual, and final delivery to the principal himself. The master of the ship cannot, with any propriety, be considered as a common carrier, or mere middle man, between the consignor and consignee. He is under the absolute control of Sperry and Stansbury, liable to be dismissed at their will and pleasure, in the same manner as any other servant may be discharged from the service of his employer. After the delivery of the goods at Malaga to the captain, Bolin & Co. ceased to have any control over them. Every connection between the vendors and the agent was at an end, and the agent became alone answerable to his employers. Nor had the agent any demands against the vendors. Not so in the case of a common carrier or middle man, who, for certain purposes, is considered as the agent of both parties, and against whom, in certain cases, either the vendor or vendee would have a right of action. So, also, in the event of the insolvency of the vendee, or refusal to take the goods, a common carrier would have an action against the vendor for his freight. So much is the master considered as the special and exclusive agent of his employer, that in no case would he have been justified in a redelivery of the goods to the vendors. This being the law, it is a difficult matter to distinguish such a delivery from one made in a man's warehouse, particularly if the warehouse be not at the place of his abode. Indeed I do not understand this to be denied, but the counsel for the plaintiffs seek to place this case on different grounds. It has been strenuously contended, that the right of stoppage *in transitu* exists in all cases where the goods have been delivered to any one for transportation, and continues until they reach the vendee, and are subject to his dominion, and it matters not in what way they are transmitted, or what agents are employed.

Brown, in his treatise on the Law of Sales, 506, deduces this principle from an elaborate review of all the authorities. "It seems clear," says the learned author, "that the reason why goods are liable to be stopped in the hands of a carrier or packer, is not because a delivery to such person on account of the vendee is only a constructive delivery, but because it is a delivery for the purpose of transport, or in the course of the conveyance of the goods to the vendee."

* The general rule, therefore, seems to be, not that the goods may be stopped after a delivery merely construc- [*19]

[Bolin and others v. Huffnagle, Assignee, &c.]

tive, and that nothing short of an actual delivery vests the property indefeasibly in the vendee, but that the state of *transitus* is put an end to by delivery either actual or constructive, and that it is only when the constructive delivery is for the purpose of transport, or is connected with the transmission of the goods, that an exception is admitted to this rule, and that they remain liable to stoppage after such delivery. In all other cases, constructive delivery is equally effectual as actual delivery to put an end to the state of *transitus*. Instead of its being a general rule, therefore, that goods are liable to stoppage after a delivery merely constructive, the general rule seems to be exactly the reverse, and it is merely an exception to the general rule, that goods are liable to stoppage after a constructive delivery to a carrier.

If this be the true rule, it is incumbent upon the plaintiffs to bring themselves within the benefit of the exception. The case finds, that Sperry and Stansbury, to whom the goods were consigned, were the owners of the ship of which Captain King, to whom the goods were delivered, was master. I think nothing of the phraseology of the bill of lading, to be delivered to Sperry and Stansbury. It is a mere form of expression, and was not intended to vary the ordinary mode of delivery to a known agent, nor was it meant as a special reservation of a right of stoppage *in transitu*, until, in the language of Lord Mansfield, they shall come to the corporal touch of the vendees. Nor do I think there is anything in the letter of instructions, which differs this from the common course of dealing between vendor and vendee. In the bill of lading, the consignors recognize the relation in which Captain King stood to his employers, who were the owners of the ship, which is altogether inconsistent with the character of a common carrier, used as a mere means of transportation between the vendor and vendee. I look upon this not as a case of constructive, but of actual delivery, and in this opinion I am supported by Mr. Lawes in his work on Charter Parties and Stoppage in Transitu, page 492, where an actual delivery is spoken of in opposition to a constructive or supposed delivery to some third person (not the immediate agent of the vendee or consignee) for the purpose of forwarding the goods to him or his agent. Mr. Bell also uses the terms actual delivery in the same sense. "Actual delivery," says the commentator, No. 127, "is held, commonly, to imply two distinct acts: the ceding the corporal possession by the seller or his servants, and the actual apprehension of corporal possession by the buyer or his servants, or by some person authorized by him to receive the goods, as his representative for the purpose of disposal, or of custody, not of mere conveyance." To the same effect is Brown in his treatise

[Bolin and others v. Huffnagle, Assignee, &c.]

on Sales, 451. Actual delivery, then, I understand to consist in the giving real possession of the thing sold to the vendee or his servants, or special *agents, who are identified with him [*20] in law, and represent him. Constructive delivery is a general term, comprehending all those acts, which although not truly conferring a real possession of the thing sold on the vendee, have been held *constructione juris*, equivalent to acts of real delivery. In this sense constructive delivery includes symbolical delivery, and all those *traditiones fictæ*, which have been admitted into the law as sufficient to vest the absolute property in the vendee, and bar the rights of lien and stoppage *in transitu*; such as marking and setting apart the goods as belonging to the vendee, charging him with warehouse rent, &c.

Whilst, therefore, I accede to the principle, not, however, to the extent claimed by the plaintiffs, I altogether deny its application to the circumstances of this case. In all cases of actual delivery the *transitus* ceases; so, also, in some where the delivery is merely constructive. The doctrine of Lord Mansfield, that the *transitus* continues until the goods come to the corporal touch of the vendee, and of Buller, that they must come into his actual possession, has been long since exploded. The extent of the doctrine in relation to constructive delivery it is unnecessary to trace. It will be sufficient for us, and more safe, to confine ourselves to the question at issue between the parties. I shall now proceed to inquire how far the authorities are in accordance with these principles. We do not think it necessary, nor indeed proper, to examine all the decisions from *Snee v. Prescott*, which is the leading case, but shall content ourselves with noticing such as have an immediate bearing on the question; nor indeed, should we think any further investigation required, were not this, in some measure, untrodden ground in our courts. Those who are desirous of seeing a complete examination of the law of stoppage *in transitu*, will be amply gratified by a resort to the elementary treatises of Abbott on Shipping, Lawes on Charter Parties, and particularly to Brown's learned treatise on the Law of Sales.

The first case, and certainly the most important, which immediately bears on the question, is *Fowler and M'Taggart*, the proper name of which is said to be *Fowler or Kymer, et al*, and was tried before Mr. Justice Grose, at Bristol. The bankrupts, Hunter & Co., were in possession of a ship let to them for a term of three years, at fifty-two pounds and ten shillings per month, they finding stock and provisions for the ship, and paying the master; during which time they were to have the entire disposition of the ship, and the complete control of her. The ship, (it appears in the statement of the case, which is given, as is

[Bolin and others v. Huffnagle, Assignee, &c.]

said, more particularly in 3 East, 396, Boehtlinck and Inglis,) had been on a voyage to Alexandria, and had the goods put on board her, to carry them on another voyage to the same place, not for the purpose of conveying them from the plaintiffs to the bankrupts, but that they might be sent by the bankrupts, upon a mercantile adventure, for which they had bought them. The [*21] principle of Fowler and Kymer, I understand *to be this, that inasmuch as the bankrupts had chartered the vessel for a term of years, and not merely for the voyage, found the stock and provisions, employed and paid the master, had the entire disposition of the ship, and complete control over her, they were *pro tempore* the owners, and that the master, under these circumstances, became the special and exclusive agent of the bankrupts, and that therefore a delivery to him was a delivery to bankrupts themselves; that the *transitus* was at an end, or more properly speaking never commenced, and that the delivery between the vendor and vendee was absolute and final. The special facts, (which are for the first time stated by Lawrence, J., in Boehtlinck v. Inglis, 3 East, 396, and which are somewhat differently stated in 1 East, 522, and which appear to have been read from the brief in the cause, 7 T. R. 442,) that the goods were bought, not for the purpose of conveying them from the plaintiffs to the bankrupts, but that they might be sent by the bankrupts upon a mercantile adventure, was not the ground of the decision, as appears from the opinion of Lawrence, J., in the same case. He says, speaking of Fowler and Kymer, there the delivery was complete; and the facts of that case differ widely from this, (meaning Boehtlinck v. Inglis,) where Crane had no control over the ship, and had merely contracted with the master, to employ his ship in fetching goods for him.

In Inglis and others v. Usherwood, 1 East, 523, the principle which I have extracted from Fowler and Kymer, is recognized. The decision of this case, says Lord Kenyon, will not trench upon the general rule of law, respecting the rights of stopping goods *in transitu*, but giving the plaintiffs the full benefit of the argument, that the delivery of the goods on board a chartered vessel was a delivery to the bankrupts, still the circumstances of the Russian ordinance set forth in this case, varies it very importantly, and takes it out of the general rule. Grose, J., who, let it be remembered, was the judge who ruled the case of Fowler and Kymer, and who ought to have understood the grounds of his decision, at least as well as Justice Lawrence, says: "I agree to the general rule, that the delivery of goods by the vendors on board a ship chartered by the vendee, is a delivery to the vendee himself." Lawrence, J., says, "If this transaction had happened in a part of this kingdom, the delivery

[Bolin and others v. Huffnagle, Assignee, &c.]

of the goods on board a ship chartered by the bankrupts, would in effect, have been a delivery to him." I do not understand the learned judge, as meaning to convey the idea, that a delivery in a foreign port would not have the same effect; for without doubt the captain would have been as much the special and exclusive agent of his employer, in one case as the other. It is the assertion of a general principle made in reference to the case of Fowler and Kymer, which had just before been more intelligibly expressed, and with a better knowledge of the grounds of the decision by Justice Grose, who ruled the cause.

*So also, Le Blanc, J., says, "I put the case of Inglis [*22] and Usherwood on the Russian ordinance. The laws of Russia make all the difference between this and the other cases referred to."

It will be recollected that the whole court were speaking in reference to Fowler and Kymer, as it then appeared, and not with the view to the subsequent discovery of Lawrence, J.

It was once supposed to be a general rule, that the delivery of goods by the vendor on board a ship chartered by the vendee, was a delivery to the vendee himself, so as to preclude the vendor's right of stoppage *in transitu*. And this opinion was entertained on the authority of the case of Fowler and Kymer. This misrepresentation has, I am inclined to believe, given rise to all the difficulty which has arisen in regard to this case. It is not the delivery on board of a chartered ship, which precludes the vendor's right of stoppage *in transitu*, but it is the delivery to the master, when he can be considered in no other light than as the exclusive agent of the vendee, that it has this effect. Where, for instance, there was a charter party of affreightment, for the voyage, and where the master was not under the control of the vendee, he would be taken as a middle man, a mere means of conveyance between the vendor and vendee; and, in such a case, the *transitus* would not end until the delivery to the vendee himself.

I am aware that Chief Justice Parsons put the case upon a different principle, but, for the reasons I have stated, I cannot concur with him in the view he has taken. He seems to put the right of stoppage *in transitu* on the destination of the goods or final termination of the voyage, a distinction which, with due deference, will be found unsatisfactory in its application, and productive of litigation. Once establish the doctrine that the right depends on such subtle distinctions, and we shall be as much plagued with cases to settle what is meant by the destination of the goods, and final termination of the voyage, as we have been to discover the kind of delivery which terminated the *transitus*. It is best to lay down a plain intelligible rule, easy in its appli-

[Bolin and others v. Hufnagle, Assignee, &c.]

cation, and to leave the modification of the rule to the contract of the parties. The distinction for which Chief Justice Parsons contends, does not seem to have been cordially received by the courts of Massachusetts, nor is it supported by the current of cases. Why the final destination of the goods should make the difference is not very intelligible, and has not been explained. In this case, according to the authority of *Stubbs v. Lund*, 7 Mass. Rep. 453, if the goods had been shipped for New Orleans, the *transitus* would have been at an end, but inasmuch as they were conveyed to Philadelphia, the *transitus* continues. The propriety of the rule is certainly not very obvious, nor should mercantile cases depend on such subtle grounds.

That the ultimate destination of the goods does not affect the right of stoppage *in transitu*, is seen from *Dixon and Baldwin*, 5 East, 188. The question always is, not whether they had arrived *at their ultimate destination, but whether the *transitus* was at an end between the parties. In *Dixon and Baldwin*, the goods had not arrived at the place of their ultimate destination, but inasmuch as they had between the vendor and vendee, the court decided that the vendor had not the right of stoppage *in transitu*.

In *Richardson v. Gross*, 3 Bos. & Pull. 127, a delivery to a warehouseman to whom the vendor pays warehouse rent, will take away the right to stop *in transitu*, although the goods have not reached their ultimate destination. Nor is it necessary, in order to prevent the exercise of this right, that the goods should have reached the consignee's place of abode, though they should even have been intended to be ultimately delivered there. And this position is proved by several cases, and particularly by *Wright v. Lawes*, 4 Esp. 82. A cargo of wines was consigned to the plaintiff, who lived at Norwich, and the usual course was to put goods intended for him into lighters, at Yarmouth, and forward them to Norwich; but his agent received the wines and not having sufficiently large cellars to hold them, deposited them in the cellars of the defendant at Yarmouth; and the plaintiff having been there and tasted the wines, that was held a complete delivery; as the carrier ceased to have any further care of them, having delivered them to the plaintiff's agent, according to the bill of lading.

In opposition to these cases, *Coates v. Railton*, 6 Barnw. & Cressw., has been cited and relied on. Lord Tenterden, before whom that cause was tried at Nisi Prius, certainly put it on the general ground, that as Lisbon was the ultimate destination of the goods, they continued to be *in transitu* when they were in the warehouse of the defendants; and that the plaintiffs, therefore, had a right to stop them. On the motion for a new trial, Lord

[Bolin and others v. Huffnagle, Assignee, &c.]

Tenterden reasserted the general principle, but further said, that the fact of their having been the general agents of the purchaser, as well as warehousemen, did not make any difference. He also seems to have put the case on the special agreement and understanding of the parties, that there should be no absolute delivery, until the goods reached their final destination. If these should be the grounds on which the cause should be deemed to stand, it is unnecessary for me to quarrel with that case. It is nothing more than the assertion of a principle, which I have never disputed; that where there is a middle man between the vendor and vendee, the *transitus* does not end until the goods reach their final destination. Nor has it been disputed that a special agreement may control the general rule of stoppage *in transitu* between the parties. Although I do not deny the principle upon which I understand the cause to have been ruled, yet I very much doubt the application of the principles to the facts of the cause. Independently of the great names by which it is supported, I should have supposed that the warehouseman was not the general, but that he was the special and exclusive agent of the vendee; in which case the delivery to him would have *been an actual, [*24] absolute, special delivery, which clearly would have ended the right of stoppage *in transitu*. This view of the case does not appear to have occurred to the court, nor was it suggested by the counsel, and is, therefore, not thought to interfere with the principles which we have deduced from the cases.

On principle, therefore, and authority, a majority of the court are of the opinion, that the *transitus* was at an end; or perhaps, more properly speaking, did not commence, upon the delivery of the goods to Captain King, who was the special and exclusive agent of the vendees.

HUSTON, J.—The plaintiffs were merchants at Malaga. One of the firm, Gatewood, was in this country. On the 15th of July, 1822, the following letter was addressed to them: “Your Mr. Gatewood we have had the pleasure to see, and received his assurance of your exertions to procure a freight for our brig, should she proceed to Malaga.

“We should prefer a freight to any port in the United States, not farther east than New York or south than Norfolk; but, if a good freight offers for New Orleans, we have no objections. If direct to Philadelphia, we have no objections, as we informed your partner, Mr. Gatewood, to receive on our account to the extent of about three thousand dollars in first quality dry Malaga wine, cask raisins and bloom raisins, an equal proportion of each, for which we will accept your draft in his favour, at four months’ sight.

(Signed)

“SPERRY and STANSBURY.”

[Bolin and others v. Huffnagle, Assignee, &c.]

On the 23d of September, 1822, the plaintiff shipped the wine and raisins as per order, to be delivered at the port of Philadelphia, to Messrs. Sperry and Stansbury, or to their assigns, they paying freight for the said goods nothing, being the owners of the said vessel. The brig in which the goods were shipped belonged to Sperry and Stansbury, and was commanded by Charles King, master, in their employment.

On the 31st of October, 1822, before the arrival of the vessel in the port of Philadelphia, and before any intelligence of the said shipment, Sperry and Stansbury became insolvent, and made a general assignment for the benefit of their creditors. On the 28th of November, the vessel arrived in the Delaware, and was detained at Newcastle by a replevin taken out by the plaintiffs (through their partner Gatewood,) and notice given to the master not to deliver the goods. The cargo was sold under an agreement of both parties, and the net proceeds deposited in bank. This action was instituted to decide the right to that money.

The right to stop goods bought on credit, while on their passage from the seller to the buyer, where the latter becomes insolvent, has been long settled. I shall not go back to the origin of this doctrine nor pretend to go through all the cases, nor [*25] decide whether *it rests on the principle, that a seller who gives goods on credit always does so under the impression that the buyer is not absolutely insolvent, or that when the buyer is totally insolvent, and cannot perform his part of the contract, it is equivalent to his saying he will not perform it, and so the contract, like all others, in such circumstances, is rescinded; or on the plain and obvious injustice of taking one man's goods to pay the debts of another; or whether all these, and other principles, entered into the view of the sages who settled the law. The principle is settled, but what cases come within it, has not at all times been agreed. After the goods are in the actual possession of the buyer, and mingled with his other property, the right is agreed to be gone; but when this possession, which puts an end to the right, exists, and when the *transitus* ends, is the question, and the decisions, certainly, are not all consistent. Lord Mansfield and Lord Kenyon each one said, the goods must come to the corporal touch of the buyer. Certainly this expression was not used literally, for they may be brought to the warehouse of the buyer, unpacked and sold, and the buyer never have laid his hand on them. A distinction was taken between actual and constructive possession, and this left the matter as uncertain as before; for what would be considered actual and what constructive possession, was by no means agreed on. At one time it was said, 3 Esp. N. P. Rep. 59, that if goods are put on board of a ship chartered by the buyer, they

[Bolin and others v. Huffnagle, Assignee, &c.]

are in his actual possession, and cannot be stopped. The cause, however, went off on another point. If another cause on the same cargo, 1 East, 518, there are to be found *dicta* to the same effect; but here again the cause went off on another point. In 3 East, 381, another case on the same cargo, the very point arose, and all the cases, particularly *Fowler v. Kymer*, were reviewed, and it was expressly decided that the delivery to a ship expressly chartered for the purpose and sent to the seller, and in which they were loaded by him, did not divest his right of stoppage; and the judge who had decided *Fowler* and *Kymer*, concurred in the decision. It was next attempted to obtain a decision, that if goods were delivered to a general agent, the right of stoppage was gone. I shall here notice the case in 4 Esp. N. P. Rep. 82, *Wright v. Lawes*. The marginal note is not warranted by the case, which is this: Shevill, by an agent, bought the wines of Bamford, Bruin & Co. in London, and they were to be delivered at Yarmouth. Before their arrival at Yarmouth, Shevill sold them to Wright, and on their arrival they were put into a warehouse, until they could be forwarded in lighters to Wright at Norwich. Wright had paid part of the money, and it was proved his purchase was fair. Shevill and his agent, being swindlers, and unable to pay, Bamford, Bruin & Co. stopped the wines in the warehouse at Yarmouth, and Wright recovered them; but here the delivery at the place named by Shevill, to the seller was complete. Shevill had not only received the wine, but sold it. The passage to Norwich was a new one, in consequence of *the second sale of the wine. The case of *Wright v. Leeds*, 3 Bos. & Pull. [*26] 320, is cited to prove, that a delivery to a general agent puts an end to the right of stopping. Moisseron was the general agent of Le Grand & Co. of Paris, and in their name purchased goods of Leeds at Manchester, to be sent to the house of Wright, a packer in London. They arrived on the 2d of September, 1802. Moisseron came there, unpacked the goods, and took some of them away, and had the rest repacked. On the 7th of September, while the goods repacked were still at the packers, Le Grand & Co. having failed, Leeds came and demanded the goods. Moisseron had authority to sell the goods in London, or send them to any part of Europe, and was not restricted to send them to Le Grand & Co. at Paris. The seller was told the goods were to be sent to London, and sent them there; and the right of stoppage was held to be gone, because the goods had arrived at the place named by the buyer to the seller, and because it depended on Moisseron to decide whether he would sell them there or export them, and whether he would send them to Paris or some other place. The same principles governed the case in 5 East, 175.

[Bolin and others v. Hufnagle, Assignee, &c.]

These cases were reviewed in a late case, 6 Barnw. & Cressw. 422, *Coates v. Railton*, and sanctioned; but this distinction is taken, that where a factor or general agent buys goods to be sent to his principal at his residence abroad, the *transitus* is not at an end when the goods come into possession of the agent, but continues until they reach the principal; but if the agent buys the goods to be sent to a market or sold where he lives, and they may as well be sent to one market as another, there the delivery at the warehouse of the agent, or named by the agent, puts an end to the right of stopping. But here Captain King had no power or authority except to carry the goods to Sperry and Stansbury. Two cases, one in 7 Mass. R. 453, *Stubbs v. Lund*, and another 9 Mass. R. 65, are to the point, and there the law is stated with a perspicuity and precision usual with Chief Justice Parsons.

On the fullest consideration it seems to me to be settled, that if the goods have arrived at the place named by the buyer to the seller as their destination, as between them, at a place where the buyer has full and absolute power to sell them or send them wherever he pleases, and where they must stay till he directs their destination, the *transitus* between the seller and buyer is at an end, and this, whether the goods are in the warehouse of the buyer or of one employed by him for the purpose, whether at the house of a packer designated by him or in a ship. But if the goods are purchased for a particular person, whether by a special or general agent, to be sent to him at a particular place specified to the seller, they are *in transitu*, until they come to the possession of the buyer, at that place, and may be stopped if the purchaser becomes insolvent, whether in the hands of a general or special carrier, or in a warehouse or in a ship, and [*27] whether that ship was chartered by the buyer *for the voyage, or hired by the master, or owned by the buyer; for the passage is not at an end; and how they are passing, whether by land or water, is not material; and I can find no principle which makes goods more in a man's possession or more under his control in his own ship, navigated by his own master, than they are in a ship chartered on freight, for the express purpose of carrying them.

This principle it is, I presume, which has led to the decision, that if the insolvent buyer goes out to sea, and meets the ship, and goes on board and actually touches every parcel, yet the seller may stop the goods after the vessel arrives, and before they are unloaded, or in the warehouse.

A storekeeper in one of our towns comes and buys goods. He loads part in his own wagon and part in a wagon hired for the trip, or to carry at so much per hundred, and instantly goes and

[Bolin and others v. Huffnagle, Assignee, &c.]

assigns all his property. I see no principle, and on a careful examination I can find no case, which forbids the merchant to follow and stop the goods in the one wagon as well as the other, if he can overtake them before they reach the storehouse of the buyer. In the one and the other, they are on their passage.

The wines and raisins here, were on their passage, and I should suppose the plaintiffs' right not gone.

J. SMITH, concurred, with HUSTON, J.

Judgment for the defendant.

Cited by Counsel in 6 C. 258; 2 Wright, 416; 5 S. 309; 1 G. 122; 2 G. 317.

The law as laid down in this case holds in England, *Van Casteel v. Booker*, 2 Exch. 691, but perhaps not in the great commercial centres of this country. *Cross v. O'Donnell*, 44 N. Y. 666; *Stubbs v. Lund*, 7 Mass. 453. The case in hand has since been followed in this State, *Thompson v. Stewart*, 7 Phila. 187, but the cases generally have tended to confine the operation of the rule to the particular facts which first called it forth, namely, a delivery on board the vendee's own vessel. Therefore a delivery of the goods to the vendee's agent who in turn delivers them to an independent carrier does not terminate the transit, *Hays v. Mouille*, 2 H. 48; nor does an intermediate delivery to such an agent, who forwards the goods under the original orders, *Cabeen v. Campbell*, 6 C. 254.

In *Donath v. Broomhead*, 7 Barr, 301, it was held where the goods were shipped from a foreign port, that the transit continued until entry at the Custom house, and the fact that the freight was paid, and the goods were not entered only because the invoice could not be found, did not alter the case.

A vendee may decline to receive the goods on account of his insolvency and the vendor's right then remains as against attaching creditors of the vendee, *Kahnweiler v. Buck*, 2 Pears. 69.

If a vendor have a right of *stoppage in transitu*, a fortiori he has a right of retainer in possession, *White v. Welsh*, 2 Wr. 396; and a partial delivery does not affect this right as to the remainder, *Wanamaker v. Yerkes*, 20 S. 443.

[PHILADELPHIA, DECEMBER 29, 1828.]

Pastorius against Fisher.

IN ERROR.

In an action for overflowing the plaintiff's land, by the erection of a dam on the land of the defendant, in which the nature and extent of the alleged injury are specially described in the declaration, the plaintiff is entitled to a verdict for nominal damages, though he fail to prove the particular injury complained of, or any other actual injury.

THIS was a special action on the case, brought by the plaintiff in error against the defendant in error, in the District Court for the city and county of *Philadelphia*, to recover damages for an injury done to the plaintiff's land by the erection of a dam on the land of the defendant.

The injury complained of, which was specially set forth in the declaration, was, that the defendant had erected a mill dam upon

[Pastorius v. Fisher.]

his own land, which caused the water to flow back upon the land of the plaintiff, and made it so spongy and rotten that he could not erect buildings for the printing of calico, by reason whereof he had sustained damage to a certain specified amount.

His Honour, Judge Hallowell, before whom the cause was [*28] *tried, delivered to the jury a charge, which was excepted to by the counsel for the plaintiff, who, in this court assigned the following errors :

1. The judge erred in giving it in charge to the jury, that the allegation of the plaintiff, in his declaration, of the way in which he had sustained damage by the overflowing of his land in consequence of the erection and maintenance of the defendant's dam, is matter of substance, and that the plaintiff must prove that he sustained damage in that particular way.

2. The judge erred in giving it in charge to the jury, that the plaintiff could not recover, merely on proof that the defendant had caused the water to back upon and overflow the plaintiff's land ; and that the jury could not find for the plaintiff, unless actual damage were proved.

Lowber, for the plaintiff in error, said, that the question was, whether or not, in an action for a nuisance, the plaintiff, whose right has been invaded, must, to entitle himself to a verdict, prove, that he has sustained actual damage. He contended, that the law was well settled, that, in order to determine the right, the plaintiff was entitled to nominal damages, although it did not appear that he had suffered actual injury from the act complained of. In support of his position, he cited *Angel on Water Courses*, 149, Appendix ; *Skin* 175 ; *Whitmore v. Calton*, 1 Gall. Rep. 476.

Scott, for the defendant in error, answered, that the action was to recover damages for an alleged injury, the nature and extent of which were very specially set out in the declaration. This specified injury was the gist of complaint, and the sole object of inquiry at the trial. The jury has declared, that the only injury pretended to have been sustained, has not been sustained. There is a gross inconsistency, therefore, in saying, that the plaintiff ought to have had a verdict for nominal damages. In a case like this, the plaintiff cannot recover, unless he prove that he has sustained both wrong and injury. Neither *injuria absque damno*, nor *damnum absque injuria*, will support the action. He cited and relied upon *Ashbey v. White*, 6 Mod. 46 ; *Hob.* 267 ; *Bull. N. P.* 120 ; *Palmer v. Mulliken*, 3 Caines, 307 ; *Angel on Water Courses*, 51.

[Pastorius v. Fisher.]

P. A. Browne, when about to reply, was stopped by the court, whose opinion was delivered by

GIBSON, C. J.—The principal point was determined in *Alexander v. Kerr*, during the last term at Pittsburg, where it was held, that the law implies damage for flooding the ground of another, though it be in the least possible degree, and without actual prejudice; and the same principle was ruled at Sunbury, the term preceding, in a case the name of which is not recollected. But where the law implies the injury, it also implies the lowest damages, except in cases of personal injury, where damages are given, not to compensate, but to punish. Here, however, it is said, the plaintiff undertook to prove special damage, and, therefore, staked his case on the event. *But, surely an attempt to prove an injury beyond what the law implies, [*29] is not, necessarily, a relinquishment of damages for everything short of the whole case. Where the plaintiff goes for special damage, he must lay it; else he shall not give evidence of it. But the converse of the rule does not hold—that having laid it, he must prove it or fail altogether. It would be neither reasonable or just to compel him to elect between real and nominal damages; or to refuse compensation so far as a substantial cause of action has been proved. The action may be brought to try the right, and the verdict, being conclusive, would stand in the way of a recovery for a substantial injury, if any were suffered afterwards. It was error, therefore, to charge against the plaintiff's right to nominal damages.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 5 Wh. 594; 5 H. 175; 6 H. 502; 12 C. 363; 6 Wright, 64; 5 S. 358; 10 S. 51; 19 S. 99.

Cited by the Court, 7 W. & S. 12; 4 Barr, 488; 7 Barr, 365; 9 C. 149.

In *Ripka v. Sergeant*, 7 W. & S. 9, the decision of this case that the law implies damages from the flooding of a person's ground, was re-affirmed, and the remedy extended to the reversioner.

Every invasion of a right is in contemplation of law a constructive damage, and to recover nominal damages no special damage need be shown. *Williams v. Esling*, 4 Barr, 486. An injunction, however, being of grace only, will not be granted unless special damage be shown, *Mayor v. Commissioners*, 7 Barr, 348.

[PHILADELPHIA, DECEMBER 29, 1823.]

The Commonwealth *against* West.

IN ERROR.

A prothonotary, who has received one thousand five hundred dollars for each year he was in office, is bound to account for, and pay over to the commonwealth, fifty *per cent.* upon all fees earned while he was in office, and received by his successor, and paid over to him after he has gone out of office.

But the sureties in his official bond, are not liable, in case of his omission to account for, and pay over the amount due to the commonwealth, upon the fees thus received.

ON a writ of error to the District Court for the city and county of *Philadelphia*, it appeared, that this was a *scire facias*, issued to the December term, 1827, by the Commonwealth of Pennsylvania, against Timothy Matlack, late prothonotary of the said court, and William West and George Worrell, his sureties, on a judgment for four thousand five hundred dollars, obtained on the 16th of February, 1824, on the prothonotary's official bond.

A case, of which the following is the substance, was stated for the opinion of the court below, to be considered as a special verdict.

Timothy Matlack was appointed prothonotary of the District Court for the city and county of Philadelphia, by a commission dated the 28th of February, 1821, and on the 6th of March, 1821, entered into a bond to the Commonwealth, in the penal sum of four thousand five hundred dollars, with William West and George Worrell, as his sureties. The bond, after reciting the appointment and commission of Mr. Matlack, as prothonotary, contained a condition in these words :

"Now, the condition of the above obligation is such, that if the above bounden, Timothy Matlack, shall, and does well and [30] truly *and faithfully, in all things, execute and perform the duties of the said office according to law, and shall also, well and faithfully account for and pay over unto the state treasury, all public moneys which shall come to his hands from time to time during his continuance in the said office, and also shall, when thereunto lawfully required, deliver up the records and other writings with the seal to the said office belonging, whole, safe and undefaced, to his lawful successor therein, then this obligation to be void, or else to be and remain in full force and virtue."

Between the 15th day of March, 1823, and the 4th day of October, 1826, both days inclusive, the said Timothy Matlack

[The Commonwealth v. West.]

received from John Goodman, Esq., his successor in office, and Randall Hutchinson, Esq., also his successor in office, the sum of nine hundred and two dollars and fifty-eight cents, at the days and in the sums mentioned in a certain account, a copy of which was annexed to, and made part of the case.

The said Timothy Matlack received more than fifteen hundred dollars per annum, during his continuance in the said office.

The Commonwealth claimed, under the acts of assembly in such case made and provided, the sum of four hundred and fifty-one dollars and twenty-nine cents, being fifty per cent. on the said sum of nine hundred and two dollars and fifty-eight cents.

Judgment having been entered on the 16th day of February, 1824, for four thousand five hundred dollars on the said bond, this *scire facias* was issued to recover the amount claimed by the Commonwealth.

The writ of *scire facias* was returned "served," as to William West, and "N. E. I." as to the other defendants.

Upon the case stated, the District Court rendered judgment in favour of the defendant; whereupon a writ of error was taken out by the Commonwealth.

In this court two questions were argued:

1. Is Timothy Matlack bound to pay the Commonwealth the amount claimed?

2. If he is so bound, is William West, his surety, liable upon the bond?

Pettit, for the commonwealth, referred to the Act of the 10th of March, 1810, sect. 1, Purd. Dig. 608; Act of the 24th of March, 1818, Purd. Dig. 609; Commonwealth v. Fidler, 12 Serg. & Rawle, 277; Lea v. Yard, 4 Dall. 95; s. c. 3 Yeates, 344; Roth v. Miller, 15 Serg. & Rawle, 107; Commonwealth v. Wolbert, 6 Binn. 292, 296, 298; Carmack v. Commonwealth, 5 Binn. 184.

J. Randall, contra, cited Act of the 13th of March, 1817, sect. 2, Purd. Dig. 423; Miller v. Stuart, 9 Wheat. 680; Arlington v. Merrieke, 2 Saund. 411, (note); Stibbs v. Clough, 1 Str. 227; Wright v. Russell, 3 Wils. 530; Montague v. Tidcomb, 2 Vern. 518; Harrison's Index, 286; Warner v. *Racy, 20 Johns. 74; Quin v. The State, 1 Harr & Johns. [*31] 36; Commonwealth v. Baynton, 4 Dall. 282.

The opinion of the court was delivered by

GIBSON, C. J.—There cannot be a doubt, that the prothonotary himself would be liable; not however, by force of the bond,

[*The Commonwealth v. West.*]

but the act of assembly. Although it may be expressed in the act, that he shall account as if he had been in office at the time of receiving, the plain meaning is, that he shall account as if the fees had been received when he was in office. He is to account only for the excess above a given sum, which it would be impossible to ascertain, as no one could tell what would have been the amount of his receipts had he remained in the office. The terms of the act of 1818, clearly embrace the case of the officer; but the surety is liable no further than he is made so by the clear and explicit terms of his contract. The condition of the bond is, that the prothonotary "shall faithfully execute and perform the duties according to law, and shall also well and faithfully account for, and pay over into the state treasury, all public moneys that shall come to his hands, from time to time, during his continuance in the said office." By the letter of the latter clause, the liability of the surety is restrained to moneys received while in office. But it is insisted, that the accounting for fees received after the expiration of the official term, is, nevertheless, an official duty; because, fees being earned in an official character, could be recovered and accounted for in no other; consequently, that the surety is liable on the general clause for the faithful execution of the office. To this there are two decisive objections: the first, that the parties themselves, did not intend to provide for this part of the subject by the general clause, having provided for it specially; and the second, that the general clause could be made subservient to the purpose, only by straining and inference, which are never employed to enlarge the responsibility of a surety. The contract of suretyship is one of mere benevolence, and is not to be carried further than the natural import of the words, because it would be unjust to intend, that one who is to derive no benefit, would consent to be bound further than he chooses to express. In doubtful cases, therefore, the construction is to be favourable to the surety. I certainly do not pretend, that, at law, the liability of a surety, especially on a joint obligation, is to be distinguished from that of the principal; and if the prothonotary were before us, in an action on this bond, I would not hold him liable. But that the case of the surety should draw after it that of the principal, is surely more reasonable than the converse of the proposition.

To a common apprehension, then, an engagement for the faithful performance of an office, would seem to relate to its immediate duties, and not to those that are remote and consequential. But the act of accounting for fees, even while in office, is, perhaps, not strictly *an official duty, as it relates to a tax

[*32] on the accountant's property, which is due by him, personally, and not in an official capacity. But there is, surely, nothing

[The Commonwealth v. West.]

of an official cast in the act, after the functions of the officer have ceased, because a refusal to perform it would not subject him to impeachment. But the parties are not supposed to have weighed matters such as these. The natural and obvious purpose of the clause, was to give assurance of diligence and faithfulness during the tenure of the office, and not to continue the responsibility of the surety, indefinitely, afterwards.

HUSTON, J.—This case was argued on two grounds : 1. That T. Matlack is not liable ; and, secondly, that if he is liable, yet his sureties are not.

Whether T. Matlack himself is liable, depends on the several acts of assembly.

The act of the 21st of March, 1777, 1 State Laws, (M'Kean's,) 58, requires all prothonotaries to give bond, &c., &c., for the faithful execution of their offices, and for the delivery of all books, records, papers, and seals, belonging to their respective offices aforesaid, whole, safe, and undefaced, to the person who shall be appointed to succeed them. (See the preamble and schedule to the present constitution and article 1st, which provides that all laws of this commonwealth in force at the time of making the said alterations and amendments in the said constitution, and not inconsistent therewith, shall continue, as if the said alterations and amendments had not been made.)

The act of the 10th of March, 1810, Purd. Dig. 608, enacts, that prothonotaries, &c., &c., shall keep fair and accurate accounts of all fees received for services performed by them or for them in their respective offices ; and shall annually furnish an account thereof under oath or affirmation to the auditor general, who shall examine the same, and, whenever the amount exceeds fifteen hundred dollars per annum, the auditor general shall charge the said officer fifty per cent. on the excess, which shall be paid by the said officer into the treasury of the state.

By the act of the 24th of March, 1818, Purd. Dig. 609, it is provided " In case of the resignation or removal of any officer who by law is accountable to the state for certain surplus fees of office, it shall be the duty of his successor in office, who, from time to time may receive and pay over such fees to his predecessor, to take duplicate receipts for the same, and to transmit one of the said receipts to the auditor general, together with a statement of such fees as may otherwise be received by the said predecessor, as far as he may be able to ascertain the same. And it shall be the duty of the auditor general to settle the accounts of the late officer, to whom such fees shall have been paid, and compel him to account upon oath, and to pay over such proportion of the arrearages of fees so received as would have been paid

[*The Commonwealth v. West.*]

[*33] to the state, had he remained *in office, allowing to such officer, in case of deficiency, in any year while he shall have held his said office, such sum as shall make up the whole sum he would have been entitled to have retained, free from any tax thereon."

It has been argued that in construing the last sentence of the act of the 24th March, 1818, we must stop at the words had he remained in office, and that the latter part of the sentence has no connection with or influence on the sense of the former. If this were so, it would introduce a new chapter on construction, and lead to a mode of ascertaining the meaning of a law totally different from what has been used since reading and writing came into use. Though these laws are not written in the most perspicuous language, the meaning cannot be mistaken by any but one whose interest it is to mistake it. The construction is that each officer within its provisions has a right to, and is to retain fifteen hundred dollars each year he continues in office, and pay to the commonwealth the one-half of any sum he receives above fifteen hundred dollars. If he receives fees for services performed while in office, after going out of office, he is to account precisely as if such fees had been received while he was in office. If no year produced fifteen hundred dollars while he was in office, and he received fees after going out of office, the commonwealth had no right to any part of this until he had made each year of the office produce fifteen hundred dollars. If fifteen hundred dollars per annum during his office is received, the commonwealth is entitled to half of all received afterwards; for no law ever contemplated that any one should continue to receive fifteen hundred dollars per year after his office had expired.

The court is unanimous in the opinion that Mr. Matlack, the officer, is bound to pay to the commonwealth the sum demanded.

But admitting that Mr. Matlack is liable, it has, however, been earnestly contended that the defendant, his surety, is not. And, first, as to the law respecting the liability of a surety. The officer and the surety sign the same bond, and same condition, are bound by the same instrument; and I know of no principle of law which carries the liability of the principal one jot beyond that of the surety, so far as depends on the bond, unless in consequence of something which occurred on the part of the obligee after the execution of the bond, or of some fraud, in fact or law, at or before the execution of the instrument.

I shall notice the cases relied on by the defendant. The first is in 2 Saund. 411, *Arlington v. Merricke*. A person was appointed deputy postmaster for six months, and gave bond with the defendant as surety for the performance of the duties of his

[The Commonwealth v. West.]

office. His appointment was renewed, and he continued after the six months, and became a defaulter; and in a suit on the bond, it was decided that the recital of an appointment limited the obligation to that appointment, and that the surety was not bound for what did not occur under it. All the cases cited in the note go this length, and no further, and conclude [*34] *that a surety is liable only according to and within the scope of his engagement.

The case in 9 Wheat. 702, 703, does not carry the law, nor profess to carry it, beyond those cases. The only real contest there was, whether the default occurred under the appointment recited in the bond, or under a different one; and the only positions of general application are, "A surety is not to be held liable by implication beyond the terms of his contract; to that extent, and in the manner and under the circumstances pointed out in his obligation, he is bound, and no further." The words of a judge are to be taken in reference to the case trying; that is in his mind—with reference to the facts of that case he is speaking. If this is not kept in mind, error and confusion will follow. The judge's expressions are true in the case before him, perhaps in all cases; but he does not say or intimate that the instrument is to be construed in one way in a suit against the principal, and in a different way where a surety is defendant. And I do not know that any court ever said so. 20 Johns. 74, is a short and not very explicit case. There, a form of bond was prescribed by law; the officer gave a bond essentially different from this form, as the court thought; and the case trying did not come within the provision of the bond given; that is not this case.

In 6 Binn. 292, *Commonwealth v. Wolbert et al.*, the surety did not allege that he was not originally liable, but contended he was discharged by the conduct of the officers of the commonwealth. I shall not enter into a vindication of the policy of requiring sureties of public officers, because it needs no vindication, and because if it did, that cannot affect our decisions on those bonds. Is this within the true meaning and intention of the bond? What do the words, "Well and truly and faithfully, in all things, execute and perform the duties of the said office, according to law," mean? The law directed the officer to pay over this money; he accepted the office on the terms of doing so; it was his duty to do so. Although it occurred after the office expired, yet it was a consequence of the office, arose out of it, or, rather, it was still a part of it; as a sheriff may sell goods levied on while in office, may return writs, &c., after his office has expired, and an auctioneer who has sold goods and taken notes while in office may collect the money after he is out

[The Commonwealth v. West.]

of office, and he and his sureties are liable to the party interested if he does not pay that money to the person entitled.

The case in 4 Dall. 96, is much stronger than this. There were two cases on two several official bonds of auctioneers against sureties. In the one the words were, "If the said *R. S. F.* shall well and faithfully discharge and perform all the duties of an auctioneer;" in the other, "Shall well and faithfully execute the above office of auctioneer according to law, and shall from time to time well and truly account for all public moneys which shall come into his hands, and pay the same into the treasury of the state," &c. The suits were not by the state, but by individuals whose goods the principals had sold, and [*35] whose money they had collected and not paid over. Smith, J., says, "Where there is a joint obligation, the law does not abstractedly recognize the character of a surety; and after all, sureties must be bound according to the true construction of the obligation, whatever may be the form of expression;" and Brackenridge, J., says the bond embraces every duty which the officer is bound to perform; and judgment for the plaintiff was unanimously affirmed by the High Court of Errors and Appeals. According to this decision, then, this first and general clause will embrace not only this debt, which it was the duty of the officer to pay to the state, but any money paid into court, and which it was his duty to pay to a private suitor; and it further decides that a second clause, specifying an obligation to pay a particular claim—that is, specifying a particular duty—does not limit or restrain the general obligation to perform all the duties of the office. Besides, what is called the second part of the obligation, "to pay into the state treasury, from time to time, all public moneys which shall come to his hands during his continuance in the said office," is referable to a distinct matter. All recognizances in the sessions are sued in the Common Pleas, and the money, when collected, is paid into court; so, all the fines on defaulting jurors, or for contempt, &c., &c. To these the officer has no right; they are emphatically public moneys, which come in from time to time. The commonwealth's share of that portion of fees which exceeds fifteen hundred dollars is not so distinctly public money, but is in effect the officer's money; at least till the settlement of his account, or until its amount is ascertained in some other way.

To conclude, these official bonds are of immense importance in this country. The commission, though made out, is never delivered until the bond is executed. The safety of the citizens, and security of the money of the state, depend in a great degree on them. Their object is open and well understood, their construction long and repeatedly settled. The sureties sign them

[The Commonwealth v. West.]

with a knowledge of all this. The law is settled, (see the cases cited, and 15 Serg. & Rawle, 107, that there cannot be one construction as to one obligor, and another as to a second obligor, (except as before stated.) For these reasons I have come to the conclusion that the defendant is liable, but a majority of the court think otherwise.

Judgment affirmed.

Cited by Counsel, 3 Penn. R. 184; 1 M. 179; 1 W. 286; 3 W. 283; 6 Barr, 117; 1 S. 369; 11 S. 229; 32 S. 469; 6 O. 599; 10 W. N. C. 148.

Commented on and followed in 8 W. 62; 6 Barr, 125.

Cited by the Court, 12 Wright, 449.

Cited by Auditor, 11 W. N. C. 462.

A provision in a statute that the bond of a surety of an officer for one term shall be binding during subsequent terms if the officer be re-elected, is valid. Water's Ap., 10 W. N. C. 146; Castor's Ap., 11 *Id.* 461.

[*36]

*[PHILADELPHIA, DECEMBER 29, 1828.]

Phillips *against* Ives.

IN ERROR.

No wager concerning any human being is recoverable in a Court of Justice. Therefore, a wager, whether or not Napoleon Bonaparte would, within a specified time, be removed or escape from the island of St. Helena, was held to be illegal and void.

ERROR to the District Court for the city and county of *Philadelphia*.

John Phillips, the plaintiff in error, brought this action against Stephen Ives, the defendant in error, to recover the amount of a wager, the evidence of which was a written paper in these words:

"May the 14th, 1821.—This day Stephen Ives bet one hundred dollars to fifty dollars with John Phillips, that Napoleon Bonaparte will, at or before the expiration of two years from the above date, be removed or escape from the island of St. Helena. It is understood between the parties that if Bonaparte should die within the above period of two years, and on the island of St. Helena, Mr. Ives loses the bet.

(Signed,)

"STEPHEN IVES,

"JOHN PHILLIPS."

"This bet is made in the presence of

"JOHN F. SWIFT."

It was proved on the trial that the defendant acknowledged he had lost the wager, and a verdict was given for the plaintiff,

[Phillips v. Ives.]

subject to the opinion of the court. The opinion of the court was divided on the subject. The President held that the wager was good and the action sustainable. One of the associate judges was of opinion, that, under no circumstances whatever, could an action be sustained upon a wager; and the other, that in this particular case an action could not be supported. A majority of the court, therefore, gave judgment for the defendant, and the plaintiff sued out a writ of error.

J. Randall, for the plaintiff in error, contended that in Pennsylvania an action upon a wager can be sustained, except in cases in which the wager is specially prohibited by act of assembly, or void at common law. The case before the court, he said, depended on authority, and afforded an opportunity to test the value of the principle of *stare decisis*. The subject has been frequently before the legislature, which, though it has thought proper to forbid wagers of certain descriptions, has left wagers at common law untouched. It is not the province of this court, by judicial legislation, to do that which belongs to [37] another branch of the government. **Steele v. Phoenix Ins. Co.*, 3 Binn. 313; *Weidel v. Roseberry*, 13 Serg. & Rawle, 180, 181. A wager, the subject-matter of which is fair, is so far from being discountenanced by courts of justice, that it is fictitiously adopted as a form of deciding the most important questions. The very substratum of a feigned issue is a supposed wager. Actions upon wagers claim a high antiquity; for, in the earliest books of entries, will be found the forms of declaring upon them. Nor is the dignity of courts at all affected by being called upon to decide such controversies. An argument like this is so complimentary to those to whom it is addressed as to be received with some complacency; but, in the present instance, it has no support. It would interfere with the decision of many cases, in which, at first, it might not be supposed to apply. What is a voyage to a foreign port but a wager upon the state of the market? Indeed, all the speculative transactions of life are, substantially, wagers. The whole subject of the impolicy of wagers was before the legislature, when, after the decision of *Morgan v. Richards*, 1 Browne's Rep. 171, and *Smith v. M'Master*, 2 Browne's Rep. 182, in which their validity was recognized, they passed laws to prohibit betting on elections, horse races, and other species of gaming, and left the general doctrine on the subject as it stood before. The question then arises, is a wager good at common law? No principle is better established by authority than that they are so when they do not interfere with good morals, or with the provisions or policy of the law. The lawfulness of wagers was recognized as

[Phillips v. Ives.]

long ago as 44th Elizabeth. In *Walcot v. Tappin*, 1 Keb. 56, 65; s. c., 1 Lev. 33, the action was upon a promise that, in consideration of twenty shillings, the defendant would give twenty pounds if Charles Stuart should be King of England within a twelvemonth. The King was in exile when the bet was made, which was about six months before his restoration. The defence was put solely on the ground of want of consideration, because the subject of it was, in contemplation of law, King of England at the time of the contract. No objection was taken, either to the legality of wagers generally or to the particular one in question; and, notwithstanding it was upon a political subject of deep interest to the nation, the plaintiff had judgment. The same objection, want of consideration, and no other, was taken in the case of *The Earl of March v. Pigot*, 5 Burr. 2802, in which the plaintiff and defendant agreed, at Newmarket, after dinner, to run the life of Sir William Codrington against that of Mr. Pigot's father. The latter died at two o'clock in the morning of the very day on which the bet was made; but this fact was not known to the parties, and the defence was, that as the defendant could not possibly win, he ought not to lose. The plaintiff had a verdict; and a rule to show cause why there should not be a new trial having been granted, it was, after argument, discharged by the unanimous opinion of the court. A wager, whether a decree of the Court of Chancery would *be reversed or not, on appeal to the House of Lords, it was determined in *Jones v. Randall*, [*38] Cowp. 37, might be recovered, unless the motive be fraud, or other *turpis causa*. In Harrison's Digest, Title Gaming, Subdivision Wagers, the cases are brought together, and it will be found that though the judges have sometimes expressed doubts as to its propriety, yet the validity of wagers, in general, is uniformly treated, established legal doctrine. In New York, it has been fully considered and recognized. *Bunn v. Riker*, 4 Johns. 436; *Campbell v. Richardson*, 10 Johns. 406. The validity of wagers, unless they be illegal, immoral, or indecent, has been fully admitted, too, in Pennsylvania, by a judge, whose strict moral sense would have led him to a different result, if he had not considered the law too well settled to be called in question. *Morgan v. Richards*, 1 Browne's Rep. 171; *Smith v. M'Masters*, 2 Browne's Rep. 182. The subject-matter of the present wager, between two American citizens, was perfectly harmless. It offended against neither law nor morals. It was a mere matter of speculation, interesting, it is true, throughout the civilized world, from the character of the extraordinary person to whom it related, but, in a national point of view, wholly immaterial. It could affect neither the life nor the security of the great state

[Phillips v. Ives.]

prisoner, had he been alive. Both were effectually protected by the great precautions taken by the British government. But, in fact, when the bet was made, he was actually dead, a fact well known as a matter of history.

P. A. Browne, for the defendant in error.—This case presents a peculiarly fit occasion for this court to determine, whether contracts, which every one admits to be immoral in their nature, and pernicious in their consequences, are good in law. It cannot, it is true, be maintained, that no wager, of any description, is valid, but, it may be contended—

1. That, by the common law of Pennsylvania, no wager is recoverable in which the parties have no other interest in the subject-matter, than that which they themselves create by the wager. This position is an answer to the argument derived from the adoption of a fictitious wager, in feigned issues, in which there is always a stipulation, that the wager itself shall not be recovered. Even the use of such a form has been regretted by a learned judge of this court. Brack. Law Misc. 211. Among other sources of the common law of Pennsylvania, we are to look to the decisions of the courts of England prior to the revolution, and it may be safely affirmed, that there is no English case, prior to the 4th of July, 1776, in which it has been decided, upon the point being made, that a wager upon an indifferent subject might be recovered. This court is, therefore, entirely unfettered by transatlantic authority; the decisions subsequent to the revolution not being binding. The earliest case is that of *The Monopolies*, 11 Coke, 84, in 44th Elizabeth, cited on the other side; in which the question was, whether the Queen's grant of a *monopoly for the making and importation of playing cards, was void; and the only part of the case which has any bearing upon the present question, is that in which it is said, that playing cards and dice is not prohibited by the common law. In the case reported under different names, in 1 Keb. 56, 65, and 1 Lev. 3, upon the wager, whether Charles Stuart would be king within a certain period, no point was made, whether a mere idle wager was good, which was taken for granted. It was not noticed either by the counsel or the court. It is, at most, therefore, a mere negative precedent, and no decision. In *Danvers v. Thistlethwait*, Sid. 394, and *St. Leger v. Pope*, 4 Mod. 406, 409; 5 Mod. 1, 4, the question was, whether the particular bet was within the statute against gaming. Neither in this, nor in any of the other cases decided before the American Revolution, was the general question ever raised. Since the revolution, the broad question, it is true, has been decided; never, however, without expressions of regret, that the

[Phillips v. Ives.]

law was, as it was believed to be, and in opposition, too, to the opinions of many distinguished judges. This court then, not being bound down by authority, are at liberty to recur to first principles, as the foundation of their decision. In the two cases cited from 1 and 2 Browne's Rep., the point was not made. If it had been, from the character of the presiding judge, it cannot be doubted, that his decision would have been against the legality of an idle bet. The decisions in New York cannot inform us as to the common law of Pennsylvania, which consists of what our fathers brought with them from England, and of what has been since established, as applicable to the condition of a moral and religious people. In a republican government particularly, whose very foundation is purity of morals, it is against principle and against morality, to give a legal sanction to gaming. In England, where the policy is to preserve great hereditary wealth in particular families, the objection to it is not so strong as in a country, the policy of which is to keep the people as nearly on a level with each other as possible, and to promote habits of industry, which are invaded by nothing so much as the spirit of gaming. We are not without example in this matter. The act of Parliament against wagering policies does not extend to this country; yet it has been expressly decided that such policies are void in Pennsylvania, because they are against principle. *Pritchett v. Ins. Co. of North America*, 3 Yeates, 458. This court upon principle, and without authority to guide them, decided in *The Commonwealth v. Sharpless*, 2 Serg. & Rawle, 91, that the private exhibition of an indecent picture, was an indictable offence. The broad principle, that good morals were part of the law of the land, was the only foundation of the decision; and surely gaming is more pernicious in its effects upon society, than the exhibition of a picture, however indecent.

Besides, the English decisions referred to, are merely decisions of courts of law; for equity not only uniformly refuses to lend its aid to carry into effect a gaming contract, but [*40] sometimes even gives its assistance to recover back money won at play. *Sir Basil Firbrace v. Brett*, 2 Vern. 70; 1 Fonb. 336; 2 Vern. 291; 14 Vin. Ab. Gaming, D. We have the full benefit of these authorities, because equity is part of the law of Pennsylvania.

2. The present wager is prohibited by the statute law of Pennsylvania. The language of the act of the 27th of April, 1794, sect. 8, *Purd. Dig.* 318, prohibits this species of gaming. It comes within the words, "any play whatsoever." If authority were wanting to show that betting is gaming, we have it. *Harrison*, in his *Digest*, cited on the opposite side classes betting under the head of gaming.

[Phillips v. Ives.]

3. The wager is void, because it interferes with the feelings and interests of a third person. Cowp. 37. It made it the interest of one of the parties that Napoleon should die within a limited time. The smallness of the bet, the character of the individual to whom it referred, and the improbability that any one would go to St. Helena to destroy him, are not material. The principle is available, no matter how remote the probability of the event to which it refers. A plausible ground is always sufficient to induce the court to refuse to carry into effect an immoral contract.

4. Napoleon was a state prisoner, and no matter how unjust his detention might have been, the policy and the duty of our government forbade an interference on its part, or a permission to its citizens to interfere with its concerns. The agreement between the parties to this suit, was an encouragement to do an act, which might involve the United States in a war with the powers of Europe. It is no argument to urge the insufficiency of the motive, the improbability of the attempt, or the difficulty of its execution. If such an attempt had been barely possible, that would have been enough. But it is well known, that many schemes, some of them deeply laid, and well arranged, were formed to carry off Napoleon from his prison, which were not carried into effect, merely because they had not his sanction.

5. The court below had not the jurisdiction of the case. The wager was one hundred dollars, and the declaration demands that sum. The District Court has jurisdiction only where the sum in controversy exceeds one hundred dollars. If the principal sum is below the jurisdiction of the court, interest accruing since the commencement of the suit, cannot extend the jurisdiction.

In reply, it was observed, that the argument of the defendant in error, was exclusively founded on an allegation of his own turpitude, and, therefore, it ought not to avail him. The doctrine contended for, would tend to deprive every underwriter of his premium, as that is the only interest he has in the policy, which is, in effect, a wager. There is no decision or even *dictum* to support the position, that a wager on an indifferent subject cannot be recovered. The only reason why the point has [*41] not been *made is, that no doubt was entertained on the subject. The argument as to the demoralizing effects of betting, is fanciful. Lotteries, which are authorized by law, are much more destructive of morals, and the peace of families. The act of 1794, relates entirely to games of address and not to wagers. As to the case cited from 3 Yeates, 458, on the subject of wager policies, it may be said, that it is by no means settled law in Pennsylvania, that such policies are illegal. The

[Phillips v. Ives.]

present wager could not interfere with the feelings of Napoleon, who was too remote, in every sense of the word, to be affected by it. If the bet leads to an inquiry into the sex or affairs of an individual, it is unlawful, but not otherwise. Its being a wager on the life of Napoleon, does not affect its validity. That was the character of the bet in *March v. Pigot*, which was held to be recoverable.

The District Court had jurisdiction. There were two counts, each upon distinct wagers of one hundred dollars. The damages were laid at one hundred and fifty dollars, and the verdict was for one hundred and twenty dollars, the judge having instructed the jury that the plaintiff was entitled to interest from the time of demand.

The opinion of the court was delivered by

HUSTON, J.—This was an action brought on a wager, evidenced by a writing in the words following:

“May the 14th, 1821. This day Stephen Ives bet one hundred dollars to fifty dollars, with John Phillips, that Napoleon Bonaparte will, at or before the expiration of two years from the above date, be removed or escape from the island of St. Helena. It is understood between the parties, that if Bonaparte should die within the above period of two years, and on the island of St. Helena, that Mr. Ives loses the bet.”

(Signed by the parties.)

Bonaparte did die on the island of St. Helena, within the two years, or was dead at that time. The District Court, on a verdict being taken for Phillips, subject to the opinion of the court, gave judgment for the defendant. The case has been well argued, and deserves serious consideration, not from the amount in dispute, but from the principle involved.

Certainly a wager can generally be recovered in England, unless where betting on the particular subject, is prohibited by act of Parliament. When we reflect that no good can result to the community from the practice of betting, that much loss and domestic distress is occasioned by it, no wonder that in that country judges have regretted that it had been ever decided that a bet could be recovered. When our ancestors separated this country from England, it was, on the 28th of January, 1777, enacted, that the common law and such of the statute laws of England as have been in *force in this province, shall be in force and binding, until altered, &c. Now, I have [*42] always believed, that the restrictive words “as have heretofore been” are as applicable to the common law as to the statute

[*Phillips v. Ives.*]

law. Much of both never was, and is not law here. And I would imitate those judges who decided, that gaming policies of insurance, though good at common law, were void here, as not suitable to the principles or genius of our institutions. In fact, this is a gaming policy ; but, as I view this case, there is another principle on which the judgment of the court is right, admitting that some wagers can be recovered ; but in this, I do not give the opinion of the court, who think the legislature only can prohibit a recovery in all cases of wagers.

No man or men have any right to occasion trouble or uneasiness to any other man or woman, and no court ought to assist them in so doing, or permit its jurisdiction to be abused for such purpose. It has been decided, that certain wagers, for example, whether a particular person was a man or woman, were not recoverable in a court of justice, because the proof might be indecent, and the investigation distressing to the persons. Although the testimony may not, in all cases, lead to inquiries, or call for proof, which is indecent ; and although the investigation may in some possible cases, not occasion distress to the person who is the subject of the bet, yet the very same bet, and the evidence to be adduced, may be very distressing to another person about whom the second bet may be made. A man of undoubted wealth, not in debt, and not surety for any person, may feel perfectly indifferent as to an investigation in a court of justice, as to the precise amount of that wealth ; but a man in other circumstances, may be much distressed and seriously injured. I may be perfectly indifferent as to a bet on my age, but there are no doubt many persons about whose age it would be impertinent to bet, and who would be much hurt by the investigation. Ordinarily, a man in prison for any cause is enough distressed ; shall it be permitted that the question of when he will be liberated, shall be the subject of wagers among idle, or thoughtless, or malicious persons, and shall the courts of justice of the country add to that distress by listening to and collecting others to listen to all that malice or avarice may be able to collect on the subject ? I would consider it as a case calling for a general rule, and say, that, as every bet about the age, or height, or weight, or wealth, or circumstances, or situation of any person, is either malicious or indecent, or impertinent, or indelicate, such bets are illegal, and that no court ought in any case, to sustain a suit on such wager ; and this, whether the subject of the bet was man, or woman, or child, married or single, native or foreigner, in this country or abroad.

I can perceive no principle of law or justice, which will require or permit the time of the country and its courts to be wasted to gratify the malice, or the curiosity, or the caprice of

[Phillips v. Ives.]

the unthinking and impertinent. There are many things which politeness *would not mention, and charity would conceal; I would not assist folly or malignity in making [43*] them public. I would not as a man, and I will not as a judge—I hold that no bet of any kind, about any human being, is recoverable in a court of justice.

GIBSON, C. J., delivered the following opinion, in which SMITH, J., concurred.

I regret that my opinion is so fixed as to compel me to dissent. It seems to me, that the policy of the law, as already settled, is not a subject for our consideration. Nothing like argument or reason has been adduced at the bar to show that the adjudications of the English courts prior to the American revolution, are not, as regards the point in controversy, binding authority and conclusive on the judgment of this court. If they be disregarded in this instance, I see nothing to prevent us from uprooting the very foundations of the common law. It has not been pretended that this wager would be invalid on any principle of those decisions. The instance most apposite, is the wager respecting the restoration of the King; in which the incitement, if any were supposed, directly tended to implicate at least one of the parties in the guilt of treason, and to involve the country in a civil war. In the case at bar, the mischievous consequences supposed to have been producible were, an enterprise against the island of St. Helena; the rescue of Napoleon; the selection by him of the United States as a place of refuge; the demand of his person by the European powers; the refusal of the American government; and, as a consequence of the whole—war. Surely we ought to look at these matters with a practical eye to their probable results, instead of encouraging a train of idle fancies, by the aid of which there is no circumstance or contingency that may not be made pregnant with danger, and unlawful as the subject of a wager. The catastrophe required the concurrence of so many accidents, as to set the accomplishment of it, at defiance. The most desperate speculator among us would not have dared to attempt what was beyond the combined means of the continental powers; nor would it have produced any consequences to the nation if he had; such an attempt being perfectly lawful, and producing no responsibility on the part of the government. But it is said, no wager is lawful which creates an interest in the death of another. The preceding remarks are equally applicable to this part of the case; for it is notorious, that it was just as difficult to take away the life of Napoleon, as to set him at liberty. The law does not presume that any one would jeopard his own life for the insignificant

[Phillips v. Ives.]

consideration of winning a bet. Of this, the case in which the parties agree to run their fathers against each other, as it was termed, is a signal instance. That case is also an authority in point against another position assumed in the argument, that no one is permitted to gain an interest in the concerns of another, by his own act. It is undoubtedly true, that a wager which [*44] prejudices the interest *or outrages the feelings of a third person, is illegal; and were there colour to suppose that the wager in the case at bar, would have thus operated on the interest or feelings of Napoleon, I would agree that it ought not to be sustained. But although dethroned and a captive, he was at an immeasurable distance from the parties, and beyond their influence or power. It seems to me that questions of this sort, are to be considered in reference to the circumstances and condition of the individual. The interest and feelings of every inhabitant of Russia and Turkey are doubtless wound up in the present contest between those two countries; and the dismemberment of the latter, would be a consequence quite as likely to be produced by the success of the former, as the catastrophe anticipated from the escape of Napoleon: yet tenderness for the feelings of the Sultan, would scarcely be thought to require the people of the United States to forego all speculations as to the event. To come nearer home. Betting on the success of particular candidates at an election, was thought to require a statute to make it unlawful. A wager which would necessarily or even probably disturb the peace of an individual, is not to be encouraged; but it has not, I believe, been understood, that a morbid and overstrained sensibility, which, in ordinary cases, does not exist, is the subject of special protection. It seems to me this wager tended neither to indecent evidence, nor to disturb the peace of the public, or of an individual; and that it was not, in its design or consequences, contrary to good manners or sound policy. I am therefore of opinion that the action be sustained.

Judgment affirmed.

Cited by Counsel, 1 G. 70.

Commented on and approved in 6 Wh. 179; 13 W. N. C. 491.

In *Edgell v. McLaughlin*, 6 Wh. 176, the court approved and extended this doctrine, and declared that no wager is recoverable in Pennsylvania. The point has since arisen on election bets, and the same rule has been applied: *Lloyd v. Leisenring*, 7 W. 294; even where the bet was made after the polls closed: *Directors of the Poor v. Phipps*, 1 Chest. Co. R. 25.

The same rule had been previously applied to contracts of insurance where the beneficiary had no interest in the life of the insured: *Pritchett v. Ins. Co.*, 3 Y. 458. And although a dictum in *Ins. Co. v. Robertshaw*, 2 C. 189, was to the effect that such an one might come into possession of a policy by assignment, a later case extends the old rule to such a state of facts, and allows no one without an interest in the life to have an interest in the policy: *Gilbert v. Moose*, 13 W. N. C. 488.

[PHILADELPHIA, DECEMBER 29, 1828.]

Barnet *against* Ihrie.

IN ERROR.

A writ of *habere facias seisinam*, is not the proper form of execution in an assize of nuisance.

It seems, that a *distringas* to compel the defendant, himself, to abate the nuisance, is the proper writ.

An execution, for costs not allowed by law, may be reversed on a writ of error.

What costs are allowable, and what are not, in an assize of nuisance.

A VERDICT of the recognitors in this assize of nuisance, having been rendered in favour of the plaintiff below, the defendant in error—"Judgment *nisi*," was entered thereon, on the 28th of January, 1826, and at half past twelve o'clock, in the morning of the 30th of the same month, the plaintiff issued a writ of execution in *the following form, which was placed in the [*45] sheriff's hands at four o'clock of the same morning:

"Northampton county, ss.

"The Commonwealth of Pennsylvania, to the Sheriff of Northampton County, greeting. Whereas, Peter Ihrie, the elder, lately in our County Court of Common Pleas, for the County of Northampton, before our judges thereof at Easton, instituted a writ of assize of nuisance against William Barnet, the elder, late of your county, for, that he, the said William Barnet, the elder, unjustly and without judgment, had erected, levied, and raised a certain wall and dam, thereby obstructing a certain mill site, and a certain water course, called the Bushkill creek, to the nuisance of the freehold of the said Peter Ihrie, the elder, situate in the Borough of Easton and county aforesaid, within thirty years, then last past, and it hath been found in our said court, by the view of the recognitors of the assize aforesaid, that the said Peter Ihrie, the elder, on the first day of January, in the year of our Lord one thousand eight hundred and twenty-six, was, and still is seised in his demesne as of fee, of, and in a certain water mill site, and two acres and fifty-nine perches of land, situate in the Borough of Easton and county aforesaid, together with a certain water course and stream of water, called the Bushkill creek, running through and along the said land from the said mill site, so that at the said mill site upon the said land, before the levying of the said wall and dam, there could be had and was a fall of six feet four inches of and upon the said water course and stream of water, to be applied to the driving of a water wheel for propelling mill works and machinery, and the said Peter Ihrie, the elder, being so thereof seised, the said William Barnet, the elder, on the day and year aforesaid,

[Barnet v. Ihrie.]

at the county and borough aforesaid, unjustly and without judgment, levied and raised a certain wall and dam, thereby obstructing the said mill site and water course, and the said stream of water running therefrom through and along the said land, by reason whereof the said land is overflowed, and the said mill site is injured ; and the fall thereof, and of the said water course is reduced to four feet, and the power thereof diminished, so that the same could not and cannot be applied as it otherwise could and would have been, and still would be applied to the driving of a water wheel for propelling mill works and machinery. Wherefore, it was considered and adjudged by our said court, that the aforesaid wall and dam be removed, and abated so as to remove the swelling thereby occasioned at and upon the lands of the said Peter Ihrie, the elder, and reduce and restore the water in the said Bushkill creek, to its natural current and channel, and the said Peter Ihrie, the elder, should recover of and from the said William Barnet, the elder, as well the sum of two hundred dollars, lawful money of the United States, for his damages which he has sustained by occasion of the obstruction and nuisance aforesaid, as also one hundred and ninety-eight [*46] dollars and sixty-eight *and a-quarter cents, which, to the said Peter Ihrie, the elder, in our said court were adjudged for his costs and charges by him about his said suit in that behalf expended, whereof the said William Barnet, the elder, is convict, as by the record and proceedings thereof, remaining in our said court more fully is manifest and appears. Therefore we command you, that justly and without delay, you cause the said wall and dam to be removed and abated so as to remove the swelling thereby occasioned at and upon the land of the said Peter Ihrie, the elder, and reduce and restore the water in the said Bushkill creek to its natural current and channel. And that of the goods and chattels, lands and tenements, of the said William Barnet, the elder, within your bailiwick, you cause to be levied the said sums of money, amounting to three hundred and ninety-eight dollars and sixty-eight and a-quarter cents, so, as aforesaid, to the said Peter Ihrie, the elder, adjudged for his damages, costs, and charges aforesaid. And have you those moneys before our judges at Easton, at our county Court of Common Pleas, there to be held for the county aforesaid, the third Monday of April next, to render to the said Peter Ihrie, the elder, for his damages, costs, and charges aforesaid. And how you shall further execute this, our writ, make manifest to our said judges, at the day and place aforesaid ; and have you then there this writ. Witness, &c."

On the writ were these endorsements, viz.

Of April term, 1826.

[Barnet v. Ihrie.]

Peter Ihrie, the elder, }
v. } *Hab. fac. seis. cum. fi. fa.*
William Barnet, the elder. }

	\$	cts.	
Real damages,			200
Interest from January 28, 1826,			
Prothonotary,	7	39	
Recognitors,	137	00	
Sheriff,	21	62½	
Plaintiff's bill,	32	16	
<i>Fieri facias</i> ,		50	
	198	67½	
Levy,	1	00	
Advertising bills,	2	25	
Cryer,		75	
Poundage,	4	14	
Execution <i>habere facias</i> ,	76	00	

The sheriff's bill was composed of the following items, viz.

Summoning defendant,	75	
Copy,	12½	
Court fees,	12½	
*24 Recognitors,	6	00
24 do. do.	6	00
24 do. do.	6	00
Attending do.	2	62½
	21	62½

The particulars of the prothonotary's fees, were these, viz.

Writ of assize,	75
<i>Venire facias</i> ,	1 50
Filing papers,	37½
First court,	37½
4 Motions,	37½
Judgment of court,	2 00
2d Court,	37½
Stationery,	10
Taxing plaintiff's bill,	18¾
Do. Recognitor's,	18¾
Trial,	75
Rule to take deposit,	27
	7 40¾
	51

[Barnet v. Ihrie.]

The fees of the recognitors were charged thus :

22 M. Term,	22 00
12 August, T.,	12 00
15 November, T.,	15 00
16 November, T.,	16 00
21 January, T., 25,	21 00
12, 26, 27, 28,	36 00
	<hr/>
	137 00

The plaintiff's bill consisted of charges for subpoenas and the attendance of witnesses.

The costs of executing the writ of *habere facias seisinam*, consisted of money paid to various persons for assisting the sheriff, a sum of three dollars seventy-five cents paid for rum and powder, a fee of two dollars to the sheriff for delivering possession, and the sum of nine dollars for six days' attendance by the sheriff.

In addition to the costs above enumerated, there was a charge of three dollars, as the attorney's fee.

From the taxation of these costs by the prothonotary, the defendant entered an appeal to the court, upon which, however, no decision was ever made.

The plaintiff moved to set aside the execution, and in support of his motion filed seven reasons; upon each of which the President of *the Court of Common Pleas delivered a written [*48] opinion. The court having refused to set aside the execution, the record was removed by writ of error to this court, where five errors were assigned in the record and proceedings below. On the argument, however, they were resolved into three points.

Jones and Binney, for the plaintiff in error.—Everything relating to the ancient action of assize of nuisance, which is now revived after a long slumber, deserves great attention. If we are to adhere to the old law, we may by diligent search go right; but if, as the court decided, when this case was last before them, this antiquated remedy is to be modelled according to modern forms, great consideration is necessary in every stage of its reformation, particularly in fixing the true character of the judgment and execution.

1. We contend, that there is error in the mandate of the execution.

2. That there is error in the costs it authorized the sheriff to make.

[Barnet v. Ihrie.]

3. That the plaintiff in error, is entitled to restitution of all the costs illegally levied.

1. It must be conceded to us, that no such writ as that in question, is any where to be found, to enforce a judgment in an assize of nuisance. It is an invention peculiar to this case, and has, for its basis, the execution in an assize of novel disseisin. Writs are duly applied by the common law to enforce particular judgments, and it is not in the power of the prothonotaries or courts to change them. A writ, adapted to the case, and of an entirely different description from the one used, is found in the Register, a book of the highest authority. Co. Litt. 73, 3 Bl. Com. 183. The mandate of this writ is to distrain the plaintiff, in order to make him abate the nuisance, in view of the jurors. "*Rex vic' salutem. Scias quod convictus est in curia nostra coram justitiariis nostris ad assisas, &c., apud S. per quandam assisam ibi inter H. & I. qd I. divertit cursum cujusdam aque in C. ad nocumentum liberi tenementi præd' H. in S. Et ideo tibi præcipimus quod distringas præd' Johannem ad reducendam præd' aquam in cursum rectum ad custagium ejusdem Johannis, per visum recognitorum assisæ præd'.*" &c. *Registrum Judiciale*, p. 56. No other form than this is to be found. There is nothing superfluous, deficient, or ambiguous. The authorities show that it is correct in principle. The object is to restore the ancient state of things. Fleta, 274, sect. 4, 269, sect. 18; Booth, 283. With this, it is impossible that the sheriff should be acquainted. But it is known to the recognitors, and therefore it is to be restored in their view. It is no objection that some of them may be dead. The business can be done as effectually in the presence of six, as of the whole number. The office of the sheriff is merely ministerial in collecting the recognitors together. If he were to undertake to restore the stream *to its ancient state, [*49] he must do so blindly, and at his peril. He is not entitled to indemnity, and is, therefore, placed under great responsibility, without protection. According to the authority of Fleta and Booth, the abatement is to be by the defendant, and the sheriff has nothing to do, unless the defendant refuses to abate, and there is nothing to distrain upon. Even upon an indictment for a nuisance, the writ does not go to the sheriff to abate, unless the party refuse to abate at his own cost. *Rex v. Newdigate*, Comb. 10. The object of the assize is to make the defendant abate, and if he do so, pending the writ, the writ itself shall abate. Fitz. Nat. Brev. 426. In this respect, it differs from a *quod permittat*, the object of which is, to authorize the plaintiff to abate. Fitz. Nat. Brev. 289; 3 Bl. Com. 221. In that case, there is no *distringas*, nor any mandate to the sheriff. When-

[Barnet v. Ihrie.]

ever the sheriff is called upon to do an act, calling for the exercise of judgment, he is provided with an inquest. The writ of *distringas* is the most convenient, peaceable, and reasonable remedy, and quite as effectual as the one resorted to, which is calculated to produce disorder and breaches of the peace. A large number of persons brought together by the sheriff, whose passions are inflamed, as well by rum, as the nature of the work in which they are about to engage, and with powder in their hands, can hardly be expected to keep within the peaceful limits of the law. To reduce a dam a few inches, is a nice operation, and can be best performed by the party most interested in it. If he does too little, he may be enforced to do what is right; but if the sheriff and his posse do too much, as is most likely to be the case, the consequences must be highly injurious. In the analogous case of detinue, the object of which is the restoration of a specific chattel, of which the sheriff knows nothing, a *distringas* is the writ of execution. Roll. Ab. 737. If this were *res nova*, the *distringas* would be the most convenient and appropriate writ that could be devised. But it is already provided, and unless the court is at liberty to depart from what has been established by law, no other can be adopted. The entry of "judgment *nisi*," in the usual short mode, is not the judgment of the court, that the sheriff shall abate according to the finding of the recognitors, unless that be the judgment which ought to have been given, which is not the case. There is nothing to show, that the court intended to give judgment, that the sheriff should restore the ancient state of things. Lill. Ent. 578; Cases Temp. Hardw. 340, 355; 1 Yeates, 92, 575; 4 Dall. 147; 3 Bl. Com. 222; 1 Binn. 251, 253; 9 Serg. & Rawle, 367; Booth, 39, were also cited in the course of the argument.

2. The execution for costs, is, in many particulars, wrong. The judgment on the roll, is "Judgment *nisi*," which is a judgment for the costs for which the execution issued. There is no such thing as a general judgment for costs, reduced to form. The costs are always set out. In no other way, can the defendant in error justify his execution. If the judgment be not for these costs, there is no judgment.

[*50] *This judgment is a legitimate subject of a writ of error. To allow or withhold costs, is not a matter of discretion with the court below. To do either improperly, is error. It is not contended on behalf of the plaintiff in error, that this court can review the evidence, upon which the court below taxed the costs which are allowed by law; but it is contended, that where under no possible state of facts, the costs charged, can be allowed, this court may reverse the execution. The inquiry does not involve a review of the evidence exhibited to the court be-

[*Barnet v. Ihrie.*]

low. If this judgment were drawn out at length, it would appear, that the greater part of the costs for which it was given, were compensatory fees which are expressly forbidden by law, and the allowance of which, makes the judge guilty of a misdemeanor in office. If the law does not authorize the costs which have been allowed, it is the duty of this court to reverse the execution. *Ilgenfritz v. Douglass*, 6 Binn. 402; *Landis v. Shaeffer*, 4 Serg. & Rawle, 196; *Stuart v. Harkins*, 3 Binn. 321; *Lewis v. England*, 4 Binn. 5; *Sneively v. Weidman*, 1 Serg. & Rawle, 417; *Galey v. Beard*, 4 Yeates, 546; *Hinds v. Knox*, 4 Serg. & Rawle, 417; *Down v. Lewis*, 13 Serg. & Rawle, 198; *Curtis v. Buzzard*, 15 Serg. & Rawle, 21; *Grace v. Altemus*, 15 Serg. & Rawle, 133; *Lord Raym.* 58; *Cassel v. Duncan*, 2 Serg. & Rawle, 57; *Wills v. Denny*, Moore, 598, pl. 819; *Field v. Massachusetts Turnpike Company*, 5 Mass. R. 389.

(The counsel then examined the several bills of cost returned with the record, and pointed out and commented upon those items which they considered as not allowed by law; referring in the course of their observations, to the Acts of the 28th March, 1814, sect. 26, 6 Sm. L. 234; 22 February, 1821, 7 Sm. L. 367, 368, 369, 377; 29 March, 1805, sect. 13, *Purd. Dig.* 345; 1 Serg. & Rawle, 505; 4 Serg. & Rawle, 291.)

The appeal from the prothonotary to the court, on the taxation of the costs, forms no objection to the review of the subject by this court. The execution was executed before the taxation. The appeal was nothing, having been entered after the money was levied. An appeal from the prothonotary to the court, in a legal sense, is nothing under any circumstances, and this court, cannot recognize it. It suspends nothing; it delays nothing. The judgment and execution remain in full force. Besides, it was abandoned by the suing out of this writ of error, by which the record is removed, and nothing left before the court below.

3. The plaintiff in error is entitled to restitution of what has been erroneously levied. It is a matter of course to award restitution on the reversal of an execution executed. *Cassel v. Duncan*, 2 Serg. & Rawle, 57.

Porter and Tilghman, for the defendant in error.—The plaintiff below, having obtained a good judgment, was entitled to have it carried into execution. It was entered in the form in which *all judgments are entered within the first four [*51] days, and must be understood to be upon the finding of the recognitors, which is incorporated into, and forms part of the judgment of the court. The recognitors have viewed the

[Barnet v. Ihrie.]

nuisance, and have found that the dam should be removed, and that the defendant should pay damages to the amount of two hundred dollars, besides costs, and this court have decided that the judgment is a good one. Whether the writ of execution is called a *distringas* or an *habere facias seisinam*, is of little consequence, provided it is calculated to carry the judgment into effect. No other can be found so well adapted to that object. The writ recites the judgment and commands the sheriff to do execution according to law. If, therefore, there is error, it is in the judgment, which it is now too late to allege. The whole of the proceedings in assize of nuisance, go on the principle of a disseisin, and this court has said, they are the same as in an assize of novel disseisin. In Lill. Ent. 598, is the form of a writ of seisin in an assize of novel disseisin of an office, which states, as this writ does, that the plaintiff recovered by the view of the recognitors of assize. In affirming the judgment in this case, at the last term, the Chief Justice declared, that in adapting this action to modern use, it is to be purged of its subtleties in matters of form, without interfering with essentials. If it is to be made to correspond with modern modes of proceeding, it must necessarily wear a different dress from what it formerly did. There could be no possible use in the presence of the recognitors. Even in England, no case has occurred for a great length of time, in which the recognitors have been present at the execution; and if the law was so three hundred years ago, that is no reason why the same highly inconvenient mode of proceeding should now be adhered to. The sheriff is the executive officer of the court. He is the highest officer, and in contemplation of law, the first man in the county. In no other hands, therefore, could the execution of the judgment of the court be placed with greater safety. If he goes beyond his duty or executes it improperly, he is responsible for his acts, and having given abundant security, there is ample redress for those who are injured. It is not pretended that any wrong was done in the execution of the writ in question. To require the presence of the recognitors, would always be inconvenient and sometimes impossible. There may be an obstruction, to abate which, would require several weeks. Are the recognitors to be present during the whole time required for its removal? This would be highly oppressive. The judgment may be removed by writ of error, and hung up in this court several years, in the course of which, some of the recognitors may die. Are the survivors to attend the execution of the writ? There is no law for that. The integrity of the jury being destroyed, execution cannot be done at all. In speaking of the view of the recognitors, both the author of Fleta and Booth, refer to the view before trial.

[Barnet v. Ihrie.]

When it is said the party shall have the nuisance removed by the *view of the recognitors, the meaning is, in consequence of their view; for when Fleta was written, the [*52] recognitors found upon their own view, without hearing witnesses. But there is direct authority to show that the sheriff, with the *posse comitatis*, is the proper instrument to abate the nuisance. 3 Bl. Com. 222. Formerly a writ of *habere facias possessionem*, was executed in the presence of viewers; but that ancient form no longer exists. *Schwenk v. Umsted*, 6 Serg. & Rawle, 354. There are other cases in which the sheriff is called upon to exercise as much discretion and judgment as in the abatement of a nuisance. In dower, the sheriff, without a jury, assigns to the widow, her third of her husband's land; and what constitutes that proportion, is left to him. If he wilfully errs, he is answerable. In the present case, the plaintiff had his election between a *distringas* and an *habere facias seisinam*. The former writ being the least efficacious, he has rejected it, and adopted the latter, as the best calculated to give effect to the judgment of the court.

2. The bill of costs is not a proper subject of examination by this court. There was an appeal to the Court of Common Pleas, from the taxation by the prothonotary, and that appeal has never been decided. There is, therefore, no judgment or order of the court in relation to the costs in question. This was the fault of the opposite party, who having objected to the taxation by the prothonotary, should have obtained the decision of the court on the subject.

In all the cases cited in support of the opposite argument, the Court of Error reviewed judgments in the inferior courts, involving the right to costs, but did not, as they would be obliged to do in this case, inquire into the taxation of the different items by the prothonotary, which would require an examination of evidence. The case cited from 5 Mass. R. 389, depended on the peculiar situation of the court in which the costs were taxed. The same court reviewed the bill. There was no writ of error from a superior to an inferior court, but an appeal from a judge of the county court, to the court in bank.

(The counsel for the defendant in error, then took up the bills of costs, and endeavoured to show that they contained no improper charges.)

The opinion of the court was delivered by

GIBSON, C. J.—It is decisive against the writ, that no precedent for it can be shown, it being essentially different from the form in the Register. We are, to say the least, by no means familiar with these antiquated remedies; and we shall proceed

[Barnet v. Ihrie.]

safely only so long as we follow the footsteps of our early predecessors, discernible in the books. We have no authority to change the nature of the remedy by adopting an execution unknown to the law. Matter of form, such as the style of process, may undoubtedly be altered to adapt it to our practice; but [*53] there is a substantial difference between *an assize of nuisance, and an assize of novel disseisin, from which the form of execution employed here, has been borrowed. Seisin, actual, or symbolical, may be delivered by the sheriff without any peculiar disadvantage to the disseisor; but it certainly would be less detrimental to the author of a nuisance, to abate it himself, especially in the case of an erection that may be still rendered useful. The sheriff and his posse, could not be expected to execute the judgment with as little injury in this respect, as the owner of the property; and, before he shall be deprived of the opportunity to abate the nuisance, which the *distringas* affords, the plaintiff must show good authority for the course proposed. He has not done so, and we are bound to say the execution issued erroneously.

An objection is made on another ground which it is unnecessary, but not improper to examine. The plaintiff has taken out execution for certain costs to which, it is said, he is not entitled; and this involves a preliminary inquiry into the jurisdiction of a Court of Error, of the subject of taxation.

According to the common law, error can be assigned only in some part of the record, and consequently not in a bill of costs. In England, where the terms of the judgment are set out at large, a gross sum is adjudged for the costs; and a Court of Error cannot inquire into the constituent parts, because these cannot judicially be made to appear; so that where costs are recoverable at all, it cannot be alleged that too much or too little was awarded. Here, however, a different practice, recognized in a long train of decisions, has made the costs so far a matter of record, as to enable the court to judge whether the constituent parts of the bill are specifically such as the law allows. With us, the judgment is never reduced to form, but signed in blank, it being considered to be in fact, what in legal estimation, it ought to be; so that where particular parts of the costs are objectionable, the remedy is not a reversal of the judgment *pro tanto*, unless there has been a special award of execution for those costs, but the execution is reversed, so far as respects the objectionable matter, as having issued without a correspondent judgment to warrant it. Here, the judgment is good in point of form, and has, in fact, been affirmed on error; so that the defendant would be without remedy, if we could not lay our hands on the execution.

[Barnet v. Ihrie.]

The limitation to this is, that we will not take cognizance of an exception, which depends on matter of fact.

The plaintiff's bill proper; the sheriff's bill, with the exception of three items for the recognitors, amounting to eighteen dollars, and attendance, two dollars and sixty-two cents; and the prothonotary's bill, with the exception of two dollars for the judgment of the court, are all unexceptionable. There is, however, a charge of one hundred and thirty-seven dollars for the attendance of the recognitors, for which there is no colour of law. Although recognitors are sometimes called jurors, they are not so within the meaning of the fee bill, the plain intent of which, was to compensate those *who should be of the general [*54] panel. But the fees even of such, are paid not by the parties, but the public; and they, therefore, are not chargeable in the bill of costs. There is no provision for recognitors; and compensatory fees are expressly forbidden. In conclusion, there is a bill for expenses incurred in doing execution, which, as well for the reason just assigned, as because the execution was unauthorized by the law, is altogether inadmissible.

Execution reversed.

Cited by Counsel, 3 R. 212, 276; 3 Barr, 128; 9 H. 529; 4 Wr. 310; 13 S. 25; 9 W. N. C. 58.

Cited by the Court, 3 R. 194; 2 J. 252.

Followed, 1 N. 31; s. c. 3 W. N. C. 180.

[PHILADELPHIA, DECEMBER 29, 1828.]

Diechman, Administrator of Smull, *against* The Northampton Bank.

If the sheriff misapply money that comes into his hands, by paying one execution, with the proceeds of property sold under another, the party who receives the money, is not bound, provided he has acted fairly, to refund it, either to the sheriff or the party whose money has been improperly paid away. It is not necessary, on receiving a payment from the sheriff, to inquire out of what fund it is made.

ON the trial of this cause at the Circuit Court of *Lehigh* county, before the Chief Justice, on the 17th of April last, it appeared that it was an action of assumpsit, brought by John Diechman, surviving administrator *de bonis non cum testamento annexo* of George Smull, deceased, against the Northampton Bank, for money had and received by the defendants to the use of the plaintiff.

The plaintiff claimed the sum of seven hundred and fifty-two dollars and forty-five cents, with interest from the 29th of October, 1819, alleged to have been improperly received by the defend-

[Diechman, Administrator of Smull, v. The Northampton Bank.]

ants, from the sheriff of Lehigh county, out of the proceeds of the sale of certain real estate of George Smull, deceased.

It appeared, that under several executions issued against Peter Smull, who was then the executor of George Smull, deceased, certain real estate of the said George Smull was sold, and the proceeds of sale, to the amount of three thousand six hundred and twenty-eight dollars and ten cents, came into the hands of the sheriff. It further appeared that certain personal property, belonging to the said Peter Smull had also been sold, the net proceeds of which, amounting to one hundred and ninety-six dollars and thirty-two cents, came into the sheriff's hands. The Northampton Bank, on the 12th of September, 1817, obtained a judgment against Peter Smull individually, upon which a *fiery facias* issued to August Term, 1818, which was returned "levied on personal property." A *venditioni exponas* issued to November Term, 1818, which was returned, "sale set aside by the court;" and to February Term, 1819, an [*55] *alias venditioni exponas* issued, *which was returned, "debt and costs paid." There was no proof that any money had been paid by Peter Smull to the sheriff, on account of this judgment, and the sale of his personal property amounted to no more than the sum of one hundred and ninety-six dollars and thirty-two cents, besides costs.

The sheriff paid to the cashier of the Northampton Bank, the sum of seven hundred and fifty-two dollars and forty-five cents, for which he gave a receipt in these words, viz. :

"Northampton Bank v. Peter Smull.

"Received, October the 29th, 1819, of Anthony Musick, (the sheriff,) seven hundred and fifty-two dollars and forty-five cents, which includes four dollars, attorney's fee, for the Northampton Bank.

Signed

"J. F. RUKE, JR., cashier."

Musick proved the payment of this money to Mr. Ruke as cashier of the bank, but whether out of real or personal property, he could not say. He said that a statement made for him by Mr. Henry King, showing the distribution of the proceeds of the real estate of George Smull, deceased, was correct, and was made to show whether he was even or uneven with the real estate. He further stated that he only settled the real estate: That the personal estate had been paid to others: That he was in the habit of depositing money in the bank, and sometimes paid parties by checks, and sometimes drew out the money himself and paid them.

The plaintiff then produced the proceedings in the Orphans'

[Diechman, Administrator of Smull, v. The Northampton Bank.]

Court, in pursuance of which Peter Smull was on the 13th of November, 1819, discharged from the office of executor of the estate of George Smull, deceased; and the letters of administration *de bonis non* of the said estate, with the will annexed, which, on the 14th of December of the same year, were granted to the plaintiff.

The defendants, after having given in evidence the vendue papers of the personal estate of Peter Smull, deceased, called J. F. Ruke, Jr., the material part of whose testimony was, that in the year 1819, he was cashier of the Northampton Bank: That Sheriff Musick, by a check on the bank, paid into his hands as cashier, the sum of money in question, in payment of Peter Smull's note: That Musick had a running account with the bank, in which he made deposits from time to time: That at different times he had received discounts, and the witness thought, that previous to giving him the check above mentioned, he obtained a discount for about three hundred dollars, but he could not say whether or not the discount made part of the money paid to him: That the discount went to Musick's credit in his general account: That after drawing the check, the balance of his account did not amount to fifty dollars; and that Sheriff Musick never deposited money to the credit of any particular suit. Some further evidence was given, which it is not necessary to state.

*The jury, under the direction of the court, found a [*56] verdict for the defendants; and a motion was made by the plaintiff's counsel, for a new trial, for which the following reasons were filed:

1. That the court erred in charging the jury.

That money claimed to be recovered, must be traced, unless it has been received unfairly, or its receipt was contrary to common honesty.

That, if received in mistake, without fraud or improper conduct, it could not be recovered unless its identity were established.

That the money claimed, could not be recovered from the defendants, if it did not appear, that, at the time of its receipt, the officers of the bank knew they were not entitled to receive it; and that, unless they received it, knowing they had no right to it, they could not be compelled to refund it.

That, if the officers of the bank received it in mistake, yet they are protected after this lapse of time, if its receipt originally took place under a belief that they were entitled to it, although that belief was incorrect.

That, unless the money received by the bank, was the identical money made by the sale of the real estate of George Smull, deceased, it could not be recovered in this suit; and that, if the

[Diechman, Administrator of Smull, v. The Northampton Bank.]

money so paid, arose from the proceeds of other executions in Sheriff Musick's hands, or from discounts obtained by him, as his account in the bank was a mixed up one, the plaintiff could not recover, although, in accounting for the proceeds of the sale of the real estate of George Smull, deceased, Sheriff Musick took credit for the sum, as being paid out of those proceeds.

2. That, under the evidence in the cause, the court should have charged the jury, that if it appeared in evidence, that the late Sheriff Musick paid the defendants the amount of their judgment against Peter Smull, or any part of it out of the proceeds of the sale of the real estate of George Smull, deceased, sold by him, the plaintiff was entitled to recover the amount so received by defendants, without establishing the identity of the money.

3. That it appeared in evidence, that on the 29th of October, 1819, the defendants did receive of Anthony Musick, as sheriff, seven hundred and fifty-two dollars and forty-five cents, the whole of which, including the sum of sixty-eight dollars and ninety-eight cents additional, was discharged by the proceeds of the said real estate, except the sum of one hundred and ninety-six dollars and thirty-two cents; and that, under this evidence the court should have charged the jury that the plaintiff was entitled to recover.

A new trial having been refused, an appeal was entered, on behalf of the plaintiff, to the court in bank.

Brooke and Porter, for the appellant.—It is perfectly clear, from the evidence, that the property of George Smull, deceased, has been appropriated, by the sheriff, to the payment of a debt due to the bank, by Peter Smull, in his individual character, and [*57] the question *is, whether the representative of George Smull, is entitled to recover back the money thus wrongfully paid? The bank knew, when they received this money, that it was paid out of a fund not applicable to the debt. The only money traced into the sheriff's hands, belonging to Peter Smull, was one hundred and ninety-six dollars and thirty-two cents. This the bank knew, or ought to have known, as they had pursued him to execution. The case comes within the well established rule, that wherever money is paid by mistake; wherever the plaintiff, in good conscience, ought to have it, or the defendant in good conscience ought not to retain it, it may be recovered in an action of *assumpsit*. It is not necessary, that the money should have been received against conscience; it is enough if it be so retained. 2 Com. on Cont. 35; *Moses v. McFerlan*, 2 Burr. 1005; 2 Pothier on Obligations, (Evans' Edit. App.) 378; *Union Bank v. Bank of the United States*, 3 Mass.

[Diechman, Administrator of Smull, v. The Northampton Bank.]

Rep. 74; *Dumond's Administrators v. Carpenter*, 3 Johns. 183. The sheriff holds money as a trustee for those who are entitled to receive it; and if he could, himself, recover from the bank, on the ground of its having been paid by mistake, (as he undoubtedly could,) and would then be bound to pay it over to the plaintiff, it may be recovered by the plaintiff directly from the bank. If a person, who is a mere stakeholder, pay money to one, which he ought to have paid to another, he who is entitled to it may recover it back, unless the contract was illegal. *Bridgm. N. P.* 60, pl. 268, 270. It is going too far to say that the identity of the money must be established. It cannot be done; and if this be the true rule, it will destroy the action of *assumpsit*, where one man has received the money of another. Nor is privity between the parties, at all necessary. If the sheriff seize the goods of A., instead of those of B., and sell them, A. may recover the money in an action of *assumpsit*; yet there is no privity. This has been long since determined.

If the court decide, that the bank may retain the money they have received, there will always be a scramble, whenever money comes into the sheriff's hands.

The circumstance of the plaintiff having slept so long before bringing his action, is easily explained. The case is peculiar. Peter Smull wasted the estate of the testator, and was ultimately dismissed from the executorship. After some time, the administrator *de bonis non* discovered the misappropriation of the money. The sheriff was insolvent, and it was in vain to look to him; and the bank having received what they were not entitled to; and, in equity, ought not to retain, this action was brought.

Davis and Binney, for the appellees.—From the 29th of October, 1819, the date of the receipt of the cashier, until the 18th of November, 1825, when this suit was brought, no intimation was ever given to the defendants, that there was anything improper in their having *received the money in question. An [*58] application is now made to unravel the transaction, long after the sheriff has gone out of office; and certainly no case of stronger equity, as regards the defendants, or of greater inconvenience, as respects the profession, can be presented. If it be sustained, it will be necessary, wherever money comes into the hands of the sheriff, that he should pay it into court, under whose order alone, there will be any security in receiving it. When attorneys receive money for their clients, inquiry is never made, out of what fund they are paid. To require them to make such an inquiry, would be attended with the utmost inconvenience in practice, and there is certainly no law to justify it. If

[Diechman, Administrator of Smull, v. The Northampton Bank.]

the rule were established, that, wherever money is paid, the receiver must investigate the payer's right to pay, half the operations of mankind would be stopped. If the receiver, in good conscience, may receive the money, he is not bound to refund, however improper the conduct of the payer may have been as regards third persons. There is a wide distinction between money and a specific chattel. For the latter, an action of trover may be maintained, no matter into whose hands it may come, on the ground, that the property has not passed out of the original owner. But, with respect to money, which is the medium of commerce, and has no mark, it is different; and where there is no privity between the parties, it cannot be recovered back, unless it has been received *mala fide*, and the identical money of the plaintiff can be traced into the hands of the defendant. *Rapalje v. Emory*, 2 Dall. 54. This has been the law ever since *Clarke v. Shee*, Cowp. 197, the first case of any importance on the subject, in which a servant paid his master's money for the insurance of lottery tickets; and it was held, that the payment having been made *mala fide*, and received by the broker in violation of law, and the identical notes and money of the plaintiff having been traced into the defendant's hands, they might be recovered back in an action of assumpsit. The same principle is the ground work of the decision of *Rogers v. The Huntingdon Bank*, 12 Serg. & Rawle, 77. In the present case, the bank had no reason to believe, that the money was not regularly paid to them under their execution. This fact was left to the jury, who have found in their favour. There was, therefore, no want of conscience on the part of the bank; but there was on the part of the plaintiff, who laid by for more than six years, and made no demand until the sheriff had become insolvent. The sheriff himself, could not recover back this money. There was no evidence of mistake, on his part, as to fact. He knew where the money came from; and it is not pretended, that when he was paying the money of George, he supposed he was paying the money of Peter. If there was no mistake in point of fact, mistake in point of law avails nothing. No instance can be found in which a party, who has paid money, with a full knowledge of facts, but under an erroneous view of [*59] the law, has been permitted to recover *it back. *Pothier* on Obligations, 391. The foundation, therefore, of the whole of the opposite argument is wanting. There was no evidence of mistake.

But, if the mistake had been proved, the sheriff could not recover from the bank, whose answer to such a claim would be, you have no right to make this demand after a lapse of six years. If Musick had filed a bill in equity, under such circumstances,

[Diechman, Administrator of Smull, v. The Northampton Bank.]

(and an action for money had and received is a bill in equity,) it would have been dismissed; which would also have been the fate of a bill filed by him for the use of the party whose money he had paid in mistake, and who had slept so long upon his claim.

Granting, however, the right of the sheriff to recover, it by no means follows, that the plaintiff has the same right. The sheriff is not the agent of the party, but the officer of the law, *Stahle v. Spohn*, 8 Serg. & Rawle, 317. Goods, after having been levied upon, become his property, and he may maintain trover for them. When they are sold, the money is his, not indeed absolutely, but in a qualified sense, and subject to his duty as a law officer. His payment was entirely independent of the plaintiff, who, if he is injured, must look to the sheriff, and not to the defendants, who did nothing against conscience in receiving the money. To maintain this action, it is not enough, that the money has been unconscientiously paid; it must be unconscientiously received also.

The opinion of the court was delivered by

HUSTON, J.—The Northampton Bank had a judgment against Peter Smull, individually, on the 12th of September, 1817. They issued a *fiery facias*, to August, 1818, which was returned “levied on personal property.” A *venditioni exponas*, issued to November Term; and an *alias venditioni exponas*, to February Term, 1819, which was returned, “debt and costs paid.” The sheriff, who was called, produced the receipt of the cashier. The cashier was called, who proved that the sheriff kept an account in the bank, but not a separate account for each suit; that his funds in the bank, at the time of paying this money, consisted of deposits, and the proceeds of a note discounted for the sheriff in the bank; that the debt was paid by a check. Evidence, however, was given to prove that the personal property of P. Smull did not sell for the amount of this debt, nay, for only about one quarter of it.

It also appeared, that Peter Smull was the executor of George Smull, at that time, (though since removed, and the plaintiff substituted in his place;) that there were three several judgments against Peter Smull, executor of George Smull, amounting to about three thousand six hundred dollars, on which lands of George Smull, deceased, were sold to that amount; and it was alleged that part of the money raised by the sale of the lands of George Smull, was applied by the sheriff to pay this debt of Peter's to the Northampton Bank.

*The judge left it to the jury to determine, whether there was any evidence that this money paid to the bank, [*60]

[Diechman, Administrator of Smull, v. The Northampton Bank.]

arose from the sale of G. Smull's estate, on which subject, the evidence was far from conclusive; and told them, in substance, that even if it should be found that this money or part of it arose from the sale of the said lands, yet if the bank or their officers did not know it to be from that source, if the bank acted fairly and received their money from an officer who had process to collect it, and who appeared to have collected it, they could keep it, and were not liable to refund it unless some fraud or unfairness had been used by them to induce the sheriff to pay the money which they knew belonged to other people, in discharge of their debt. There was no error in the charge, and this case admits of no doubt. The doctrine that if a man pays money by mistake, does not apply to a case like this. I believe no sheriff keeps an account in bank for every different suit put into his hands. The plaintiff, whose execution he has levied and on which he has sold, has a right to apply for his money, and if it is paid him, he may safely take it and give a receipt. He is not bound to inquire, whether this is the identical money made by the sale of his debtor's goods: to make such inquiry, would be impertinent. If he receives no more than was due, he is not answerable for that money to any person. It would be intolerable if a plaintiff, after expense and delay in collecting a debt, should subject himself to twenty suits by receiving it; and, according to the plaintiff's doctrine, he would do so, if twenty persons could prove that a part of the money belonging to them, was used by the sheriff in paying that person.

It too often happens that sheriffs misapply money. The misapplication of money belonging to one man, leads to misapplication of the next money coming into his hands, and so on to the end of his office; and thus every execution would give rise to a new suit. But, in these cases, there is no mistake: the sheriff knows he is misapplying money; he who receives it does not know it, but he knows he is receiving what the sheriff owes him, and he is not bound to know more. The sheriff himself could not, in such case, recover it back. The sheriff and his sureties were liable, perhaps, to the plaintiff; the bank never was, and, if it was, from the facts and dates in this case, the Statute of Limitations, which was pleaded, was a bar to the plaintiff's recovery. The cases of *Rapalje v. Emory*, in 2 Dall. 51, and *Rogers v. The Huntingdon Bank*, 12 Serg. & Rawle, 77, are much stronger than this.

SMITH, J., having been employed as counsel in the cause, took no part in the decision.

Judgment affirmed.

Cited by Counsel, 1 Penn. R. 175; 1 Wh. 107; 3 W. 43; 7 Barr. 519; 3 H. 425; 9 H. 303; 14 Wr. 23; 7 O. 489; s. c. 14 W. N. C. 220.

*[PHILADELPHIA, DECEMBER 29, 1828.]

[*61]

Shields and Others, Executors of Shields, *against* Owens.

IN ERROR.

A church being in embarrassed circumstances, borrowed money of certain banks, for which two of its members gave notes drawn and indorsed by themselves. The banks having required further security, an agreement was entered into, by which, upon a third member of the congregation consenting to become an additional indorser upon the notes, thirty others bound themselves, in default of payment being made by the church, to make good the deficiency, so that the drawers and indorsers of the notes should not suffer loss, provided the said drawers and indorsers should continue their names on the notes to the end of the time required for the payment of the debt, which it was stipulated should be paid off in ten years, by annual instalments of ten per cent.; and in case the church should make default in paying these instalments, the subscribers to the contract agreed, that the deficiencies should be divided among them in equal parts. The notes were regularly renewed, from time to time, until the death of the last indorser, which took place a few years after the date of the agreement. After his death, his executors were called upon by a committee of the church to renew the notes, which the banks would have permitted under the circumstances of the case. The executors, however, refused to renew, suffered the notes to be protested, and afterwards paid them. After the lapse of several years, they brought this action against the defendant, as one of the thirty who had signed the agreement of indemnity, to recover his proportion of the instalments of ten per cent., which had become due prior to the commencement of the action. Held, that they had substantially complied with the contract of their testator, and were entitled to recover.

In the Court of Common Pleas of *Philadelphia* county, to which this was a writ of error, Thomas, Robert, John and David Shields, executors of Thomas Shields, deceased, brought this action to September Term, 1823, against John Owens, the defendant in error, to recover a sum of money alleged to be due under a certain agreement, bearing date the 28th of July, 1817.

It was agreed that the cause should be tried on the merits, without regard to the form of action or of the pleadings.

The charge of the President of the court below, which was filed agreeably to the directions of the act of assembly, contained the only statement of facts which appeared on the record. It was as follows:

KING, President.—“This action is brought by the plaintiffs, acting executors of Thomas Shields deceased, to recover, of the defendant, the sum of \$——, which, it is supposed, he has become liable to pay to them under the following circumstances:—The Baptist church, in Sansom street, Philadelphia, was incorporated in the year 1811, and being in want of funds to carry on their building, several of the members borrowed money, for

[Shields and others, Executors of Shields, v. Owens.]

the use of the church, of the banks of Pennsylvania and Philadelphia, and gave them their promissory notes, which were discounted by these institutions, and the proceeds applied to the use of the church. The notes *commenced in 1811, and [*62] continued up to 1817; at first increasing, and afterwards diminishing in amount. The banks becoming dissatisfied with the security about this time, Thomas Shields, the deceased, then a member of the church, became an indorser upon the notes, in consequence of which, the credit given to the church was continued. To secure the testator from eventual responsibility, the stipulation or indemnity, which is the foundation of this action, was signed by Thomas Shields, by John Owens, the defendant, and twenty-nine others.

[His Honour here read the contract, which was in these words:]

“The Baptist Church, in Sansom street, Philadelphia, of which the Lord has been pleased to make us members, being, at this time, under pecuniary embarrassment, on account of money borrowed for the use of the church, of the banks of Pennsylvania and Philadelphia, and, a further security being required, that a length of time may be given for the payment of said notes, we, the subscribers, do agree, and do hereby firmly bind ourselves, and our legal representatives, that, upon our brother, Thomas Shields, becoming one of the three indorsers of the notes in said banks (whose names will then stand as follows: Joseph Maylin, C. F. Regnault, and Thomas Shields,) that, in default of payment being made by the said church, in manner and time as hereafter specified, we will contribute and make good such deficiencies to the utmost extent; so that the said drawer and indorsers shall not suffer any loss thereby. It being understood, expressly, that the parties to the said notes shall (whether drawer or indorsers) continue their name to the end of the time which may be required for payment of the same; the aggregate amount being six thousand three hundred dollars; and it being agreed, that the same shall be paid by instalments of ten per cent. per annum, to be paid off in ten years. And, in case of default of the church, in paying the instalments, the deficiencies shall be divided amongst us, in equal parts, according to the number of the subscribers to this instrument, and in no otherwise; and it is further agreed, that if any of the subscribers shall, in the space of three years from the date hereof, pay for him or herself, or procure and pay to the church (for the express purpose of paying the aforesaid sum of six thousand three hundred dollars) the full and entire sum which shall be his or her proportion of the said notes, dividing according to the number of the names subscribed to this instrument, that such

[Shields and others, Executors of Shields, v. Owens.]

person shall be released from all further obligation or responsibility, and his or her name be considered as taken off.

“Philadelphia, 28th of July, 1817.

(Signed)

“THOMAS SHIELDS,

“JOHN OWEN and 29 others.”

“Mr. Shields’ indorsement continued until his death, which took place on the 8th of December, 1819, during which time the notes were gradually reduced by the church, in amount, according to the *testimony of Mr. Britton, exceeding the ten [*63] per cent., stipulated in the contract of indemnity. At this time two notes were in bank, which had been discounted: one for \$1700, in the bank of Philadelphia, dated the 27th of September, 1819, drawn by Clarie Francois Regnault, and indorsed by Joseph Maylin, and Thomas Shields, payable in ninety days; and the other in the bank of Pennsylvania, for \$2300, dated the 29th of September, 1819, payable in ninety days, and drawn and indorsed by the same parties. Thomas Shields died intestate, and constituted his sons, Thomas, Robert, John, and David Shields his executors. Robert, John, and David only, proved the will, and obtained letters testamentary. Immediately after the death of Thomas Shields, and before these notes became due, a committee was appointed by the Baptist Church, to wait upon the executors and the bank, in order to arrange for the continuance of the notes. Mr. Britton states, that he first called upon the president of the Bank of Pennsylvania, and inquired whether there would be any difficulty in renewing the notes in that bank. Mr. Norris said, that he presumed there would be none; although it was not the usual course of business for executors to obtain discounts, he said, that under peculiar circumstances it might be done, and that he thought this was such a case. A similar answer was received from Mr. Campbell, the cashier of the bank of Philadelphia. The committee then waited upon the executors. Two of them, Thomas and David, were willing to renew: the others declined making an arrangement, and insisted upon the payment of the notes as they came to maturity. In this conversation, the result of their interview with the officers of the banks, was communicated, by the committee, to the executors. Both notes were accordingly protested, and, subsequently paid and taken out of bank by the executors. The plaintiffs afterwards proceeded against Regnault and Maylin, the previous indorser and drawer of the notes; and on the 27th of November, 1822, came to a compromise with them, by which, on the receipt of three promissory notes for \$883.33, each, drawn by Maylin, and indorsed by one Edward Thomas, the plaintiffs exonerated and

[Shields and others, Executors of Shields, v. Owens.]

discharged Maylin and Regnault, reserving their rights against the church and the signers of the guarantee. In order to fully understand the grounds of defence, assumed in the cause, it is necessary again, to refer to a period anterior to the death of Thomas Shields. The Baptist Church was indebted; first, to the stockholders; secondly, for the principal of the ground rent upon which the church was built; thirdly, upon mortgage; and, otherwise, in a sum near \$40,000. Before the death of Mr. Shields, the members were desirous of paying off the notes upon which he was indorser. Mr. Shields, himself, offered to subscribe \$1000 towards this object, if an exertion was made, among the members, to effectuate its success. A subscription was set on foot for this purpose, and a considerable amount subscribed. In pursuance of this engagement, and while on his death bed, viz., on the 26th of November, 1819, Mr. Shields [*64] signed an agreement to pay \$1000 towards the liquidation of these notes, stipulating, however, that he should not be called upon to pay the amount, unless the whole \$4000, due on the notes, were subscribed. The whole sum was not, however, raised at the time the notes became due, nor at any time afterwards. After the death of Mr. Shields, and before the notes became due, a society was formed, called 'The Mite Society,' whose object was to raise, by small contributions among the members, funds to meet the instalments due upon, and eventually to discharge these notes. More than \$1000 were subscribed for this purpose. In consequence, however, say the defendant's witnesses, of the refusal of the plaintiffs to renew the notes, and of their insisting upon their payment, the efforts of the Mite Society were arrested, as was the previous subscription, towards which Mr. Shields was a subscriber for \$1000. Those who subscribed, seeing their efforts likely to prove abortive, refused payment, and the church was compelled to make an assignment for the use of its creditors. Mr. Britton attributes this result to the refusal of the plaintiffs to renew, and believes, that if the notes had gone on, funds adequate for the settlement of them, would have been received from these sources. This witness states that the committee argued with the executors, that they could run no risk in signing these notes, as they were not only executors but heirs. There is no pretence that the estate was insolvent. It also appears, that the church contributed to the payments made by Maylin, and, that this was known to the plaintiffs. Such appears to be a compendious view of the defendant's testimony. The plaintiffs, by way of rebutting evidence, have adduced two certificates from the president of the Pennsylvania Bank, and the cashier of the Philadelphia Bank, which have been read by consent, the object of which is to show,

[Shields and others, Executors of Shields, v. Owens.]

that it is not the general practice of these institutions to discount notes drawn and indorsed by executors in their official capacities. These gentlemen have also been examined before you, and have sustained their written statements. The plaintiffs have also adduced a notice, given by them to the trustees of the Baptist Church, upon the 1st of April, 1820, in which they offered to pay their father's subscription of \$1000, towards liquidating the notes, if the church should raise the balance before the 20th of the ensuing June, and that, in default thereof, they should consider themselves discharged from all obligation to pay the subscription. This, however, was after the mischief was done. If the defendant's witnesses speak correctly, the notes had been protested the December preceding, and the train of disastrous circumstances which followed, had all occurred. The church has been sold since for \$3750, subject to a mortgage, and a ground rent of \$8000 ; a most severe sacrifice indeed.

"In order to enable us to come to a correct conclusion in this controversy, we are to inquire, what is the nature of the defendant's contract ; has it been complied with, and if nay, are there any causes *which, according to the principles of law and equity, will exempt him from responsibility, for [*65] or on an account of such breach. First, as to the nature of the agreement of the 28th of July, 1817, signed by the defendant and others. It is a contract of guarantee or indemnity. The church was the principal debtor ; Regnault, Maylin, and Shields, sureties, and the signers of the agreement guarantees of those sureties. Its terms are explicit. The parties to it are bound for the default of the church, 'in manner and time, as therein-after specified.' The manner was 'that the parties to the said notes (whether drawer or indorsers) should continue to the end of the time which might be required for the payment of the same.' The time stipulated for, was, that the notes should be paid by instalments of ten per cent. per annum, to be paid off in ten years. A surety who, if a court of justice can have favourites, is always so, is merely bound by the precise terms of his contract. However, the convenience of a modification may be to the party secured, or however desirable it may become, from a change in circumstances, the surety may answer, that he never entered into such a contract as that prepared to be substituted for his agreement. So, in the case before us ; the death of Thomas Shields in no respect changed the nature and extent of the defendant's responsibility. It remained after that event as before ; a contract, that the Baptist Church should extinguish the original debt in ten years, and, at the rate of ten per cent. per annum. As respects this head of the cause, it is immaterial whether the banks would or would not have continued the dis-

[Shields and others, Executors of Shields, v. Owens.]

counts upon the indorsement of the executors. If immediate payment was coerced from the plaintiffs, the defendant was answerable over to them, only on the terms of his contract. The plaintiffs have actually conceded this position by bringing their action for the annual instalments, which have grown due since the 27th and 29th of December, 1819. If, indeed, the banks had refused to continue the discounts upon the credit of the plaintiffs, and, in consequence of this refusal, they paid the notes, the defendant would certainly have been responsible for the default of the church in paying the annual instalments. In such a case, although in form, the notes were not continued, yet the substance of the contract was complied with. The responsibility would not, in such a state of things, have been either increased or varied. But, whether the banks would or would not have continued the discounts upon the credit of the plaintiffs as executors, becomes material, as an ingredient in another view of the case, which is now to be considered. This question, as all others in the cause, which are pure matters of fact, are for your decision. But, assuming that the banks would have continued these discounts, the estate, being fully adequate for their payment as for all other demands against it, has the refusal of the plaintiffs to accept the discounts, and their demand of immediate payment from the church, followed, as it was, by the insolvency of the church, [*66] produced any and what legal effect upon *the obligation of the defendant's contract? For, if the plaintiffs have done or omitted nothing which renders it against equity that they should recover, the fact of having paid the whole debt, and of not being reimbursed by the church, gives them an undoubted claim to recover the annual instalments due at the time of bringing this action. It is a well settled principle of law, that the creditor has no right to increase the risk or vary the contract of the surety. Beyond his specific engagement he is never bound. 'Calculating,' says Chief Justice Kent, 'upon the extent of that engagement, he is not supposed to bestow his attention upon the terms of the transaction, and is only prepared to meet the contingency, when it shall arrive, in the mode and time presented in the contract.' So strict has been the construction of the contracts of sureties, that a contract to indemnify a mercantile company against the non-payment of a customer, has been held to terminate with the removal of one of the partners, or, when given to one individual, to terminate upon his associating himself in trade with another. Nor, when given to a mercantile company of several, does it extend to survivors. Again, a contract to guaranty A., if he furnishes goods to B., will be of no avail to A., if through him, and upon his credit, the goods are furnished by G.; nor if the guarantee is given, if

[Shields and others, Executors of Shields, v. Owens.]

a greater credit is allowed, will it be available if a less one is given. These are examples of the strictness of construction given to the terms of a guarantee. Where there is no difficulty as to the extent of the contract, yet, if time is given to the principal debtor, by the creditor, without the assent of the surety, or if he does any act, varying the contract, and increasing the risk of the surety, the latter is discharged.

“To apply these principles to the case before us. First, as to the construction of the agreement of the 28th of July, as between Thomas Shields, whose name is attached to it, and the other parties to it. It was a contract that Mr. Shields should not call for payment of the money of the church at any other time or manner than was ‘therein specified.’ Although the church was always responsible to the drawers and indorsers of the notes, in the event of their being called upon and actually paying the notes, yet Thomas Shields, if he desired to retain his claim against the guarantees, could not refuse to extend the stipulated credit to the church, nor resist an immediate payment. There would be no mutuality in a contract whereby a surety guaranteed the payment of a debt to the creditor, in regular instalments, if the creditor could immediately afterwards proceed against his debtor for the whole claim, and still retain his right to proceed from time to time against the surety, if he failed in getting payment in full. If this could be allowed, such would be the case here; for Britton says, the church aided Maylin in his payments, and the plaintiffs knew it. Engagements of the kind alluded to, are of every day’s occurrence, and it never could be endured, that a creditor, after receiving such *a security, should, after [*67] driving his debtor to insolvency by proceeding at once for his whole claim, still retain the right to call upon the surety for the instalments as they became due. The universal object of entering into such responsibilities, is to give the principal debtor a chance to retrieve his shattered fortunes. The effect of proceeding at once for the whole arrear, always, if allowed, makes the surety pay the debt. But if the debtor was let alone to pay the debt in the time and manner for which the surety has bound himself, he often would be able to do so. This is a calculation which enters the mind of every prudent man who becomes surety under such circumstances.

“But if the construction we have given to this contract is questionable, yet the evidence discloses facts, which, if believed by you, exhibit conduct calculated to increase the risk and vary the contract of the sureties, so as to bring this case within that class of decisions in which courts of equity have held the surety discharged. We will not again recapitulate them, but

[Shields and others, Executors of Shields, v. Owens.]

content ourselves with saying, that, if you believe from the evidence that the plaintiffs could have renewed their notes, but refused to do so, and demanded immediate payment by the church: that in consequence of such refusal and demand, the subscription of the members, and the contributions of The Mite Society failed; and that this pressure produced the insolvency of the church, such a course of procedure was inconsistent with the rights of the sureties, and operates to discharge them from all liability upon their agreement."

The jury found a verdict for the defendant, agreeably to the charge of the court, and the record having been removed by writ of error to this court, the following errors were assigned.

1. That the court erred in the construction of the agreement of the 28th of July, 1817, signed by the defendant and others, and regarding it as a contract of indemnity, the Baptist Church the principal debtor, Shields and others, drawers and indorsers of the notes, as sureties, and the signers of the agreement merely as guarantees of those sureties.

2. That the court erred in considering the defendant and the other signers of the said agreement as sureties merely, and applying to them the principles of law as laid down in their opinion.

3. That the court erred in stating that the executors of Thomas Shields were, by the terms of the said agreement, bound to continue or renew the notes after his death, either by drawing or indorsing new ones.

4. That the court erred in charging the jury "that, if you believe, from the evidence, the plaintiffs could have renewed these notes, but refused so to do, and demanded immediate payment by the church, that in consequence, such refusal and demand, the subscription of the members, and the contributions of The Mite Society failed, and that this pressure produced the insolvency of the church, such a course of procedure was inconsistent *with the rights of the sureties, (meaning the [*68] defendant and the other signers), and operates to discharge them from all liability upon their agreement."

J. M. Reed, for the plaintiffs in error.

1, 2, 3. When the agreement of the 28th of July, 1817, was entered into, the parties knew that the banks look to individual responsibility alone, and are not in the habit of discounting notes, drawn or indorsed by executors as such. The contract must, therefore, be construed with reference to this practice, as it never could have been the intention of the parties to stipulate for the performance of an act, which did not depend upon themselves, or any person over whom they had any control. The contract had reference to individuals, whom it was known

[Shields and others, Executors of Shields, v. Owens.]

the banks would take, and not to executors or administrators, whom it was known they would not take. In the instrument, the drawer and indorsers are universally spoken of as individuals, and in no part of it, is there anything which looks like an intention to impose upon their representatives, after their death, the obligation of renewing their notes. Circumstances might have occurred even in the lifetime of those persons, which, by rendering the acts they had agreed to perform impossible, would have released them from their undertaking, without affecting their right to resort to those who had agreed to indemnify them. If the banks, from any cause, had refused to renew the notes, or if the charters of these institutions had expired, as that of the Philadelphia Bank actually did in 1824, though it was renewed; in either of these cases, the plaintiff's testator could not have complied with his agreement; and yet it is obvious, that a non-compliance under such circumstances, would not have been a forfeiture of his right to call on the signers of the agreement as often as the payments of ten per cent. became due. The death of the indorser is an event of the same character, which put it out of the power of the testator to perform his agreement, and so it must have been considered by the parties; for, when the well-known practice of the banks forbade a renewal by executors, it cannot be supposed a contract was entered into in contemplation of so improbable an event, as that the banks would consider this to be a case of so peculiar a nature, as to induce them to contravene their established rule. It is true, that in many cases executors are bound, though not named; but it is not always so. They are not bound where the contract is for the mere personal act of the testator, which he alone can perform, and which, therefore, death puts an end to. 2 Bac. Ab. 69; Covt. P. 3 Vin. Ab. 381; 3 Bac. Ab. 95; Cro. Eliz. 552; 3 Com. Dig. 258; Covt. c. 1; *Cooke v. Colcraft*, 3 Wils. 386; 2 Wm. Bl. 856, s. c.; *The Commonwealth v. King*, 4 Serg. & Rawle, 109. The contract in the present instance was of this description; no one could perform it but Thomas Shields himself. It was to indorse his name upon the notes. For the executors to have indorsed them, would have been out of *the usual course of their duty; and if it had been [*69] intended they should do so, that intention would have been declared. They were under no obligation to renew the notes either in their official or individual capacities. If they had done so, it would have been a voluntary act merely.

4. If the preceding argument be sound, there is error in the fourth specification also. If it was not the duty of the executors to renew the notes, it was of no importance in a legal point of view, whether or not their refusal produced the insolvency

[Shields and others, Executors of Shields, v. Owens.]

of the church, and all those disastrous consequences which are said to have ensued.

(The court having intimated that this point was the same in substance as those which preceded it, and that the only question was, whether the contract was terminated by the death of Thomas Shields, the argument was pressed no further.)

Gilpin and *J. R. Ingersoll*, for the defendant in error.—The object the parties had in view in entering into the agreement, which is the foundation of this suit, was, by giving time to the church, to enable it gradually to pay off its debts. It constituted a partnership of liability between the signers and the plaintiff's testator, who could not call upon those who had undertaken to secure him, without performance of his part of the contract. They mutually agree to become responsible, upon certain terms, which formed a condition precedent. The condition was, that Shields should not call upon the signers of the agreement in less than ten years, with the further condition that he should, during that period, renew the notes. The embarrassed situation of the church, called for such an arrangement, which, if it had been carried into full effect, would have eventuated in the payment of the debt, and the relief of the corporation. The agreement was entered into solely with this view, and the parties expressly stipulated for the terms and manner in which they were to become bound. In no other way, therefore, can they be bound. This engagement was strictly an engagement of suretyship, and is to receive the construction uniformly given to engagements of such a nature. It cannot be extended by implications beyond its express terms, *Miller v. Stuart*, 9 Wheat, 703. The undertaking of the signers of the agreement was to pay, if the church did not, provided ten years were allowed to the church, and provided the notes were renewed in the mean time. Time was of the first importance to them, in order to give full scope to the efforts of "The Mite Society," and to all other arrangements which had been made, or might be made, to promote the object. They therefore meant to guard themselves against being called upon within the period prescribed. In this state of things, what was the effect of the death of Shields? The debt to the banks remained. The obligation of the thirty to see that debt paid in exoneration of Maylin, Regnault and Shields, also remained. The only difference was, that the executors of Shields *were to

[*70] take his place. He had provided for the payment of the debt, in a certain mode; this mode his executors might have adopted or rejected; but they could not adopt it in part, and reject it in part. They could not derive a benefit from the con-

[Shields and others, Executors of Shields, v. Owens.]

tract, without performing their own part of it. They could not repudiate it, as respected themselves, and at the same time claim under it. They suffered the notes to be protested; in consequence of which, the credit of the church was destroyed and ruin followed; and they now ask to enforce this contract for their own benefit, against those, whom by their own acts they have injured. Whether or not the banks would have accepted the indorsement of the executors, is not material, because the engagement was for a renewal; and the defendant was not bound, unless the notes were renewed, at all events. But speculative argument is superfluous, because the fact was, and the jury have so found it, that the notes might have been renewed. It was one of those peculiar cases, in which the banks would have received the indorsement of the executors; and this fact was communicated to them by the committee, when they were applied to on the subject. The defence, therefore, now set up, was evidently an after thought. The contract was by no means of such a nature, that no one could perform it but Thomas Shields himself. It was not necessary that he should, with his own hand, affix his name to the notes. The responsibility of his estate was the object. If from illness, or any other cause, he had been deprived of the use of his hands, it will hardly be pretended that he might not have indorsed through the instrumentality of another person, and that if he had omitted to do so, he would have been released from his obligation, while his sureties remained bound. So on his death, his executors representing him, might have indorsed the notes instead of him. They were bound to perform the contract of their testator, whether named or not, and an action might have been sustained against them for their refusal. Cro. Eliz. 553; 1 Wash. Virg. Rep. 308; Toller on Exrs. 59, 60. That Shields himself considered the contract binding, after his dissolution, is evident, from the anxiety he evinced on his death bed to have the business settled; doubtless, anticipating trouble to his children if it were not. There was nothing in the way of a perfect fulfilment of the contract, and ultimate payment of the debt, in the manner contemplated, but the sullen and obstinate refusal of the plaintiffs to do their duty. If the judge had said, in general terms, that the death of Thomas Shields made no difference, he would not have been wrong; but he never said so, except in connection with the facts of the case, which he left to the jury; and this court have often decided that the whole charge must be taken together, and not any one part by itself.

The opinion of the court was delivered by

TOD, J.—There are certain rules of equity which deal favour-

[Shields and others, Executors of Shields, v. Owens.]

ably with the contracts of sureties ; yet those rules do not seem [*71] to us *strictly to apply to the present case. Shields, the testator, had his name upon the notes, as indorser ; but he did not receive the money, nor any part of it, nor was the original loan upon his credit, nor was he in any manner bound until induced to become indorser by a written stipulation of indemnity. As far as one may be called a surety, who, without personal interest or prospect of gain to himself, lends his credit, and becomes bound for the debts of others, so far it would appear, that Shields, the testator himself, stood as a surety, rather than as a principal. Shortly, the case is—The Baptist Church in Sansom Street, being in debt about forty thousand dollars, and about six thousand dollars of it being due to the Philadelphia Bank and the Bank of Pennsylvania, on loans obtained some years before, not upon the credit of the corporation but upon the notes of Mr. Maylin and Mr. Regnault, and the banks becoming dissatisfied with the security, and refusing to renew without an additional indorser, Mr. Shields, the testator, agreed to become this additional indorser, upon a previous written contract of indemnity, signed by Shields, himself, and by thirty other members of the congregation, among the rest by Mr. Owens, the defendant. Upon that contract the present suit is brought : (His Honour here stated the contents of the agreement on the 28th of July, 1817.)

According to this agreement, Shields, the testator, continued to renew his indorsements at intervals of ninety days, as long as he lived, which was two or three years. At his death the two debts had been diminished by payments to about one half. His four sons, the plaintiffs, were left devisees of his estate, and executors of his will. They were applied to on the part of the congregation, to renew and continue the indorsement of the notes. Two of them were willing and two refused. There was some uncertainty of proof whether the bank would take an indorsement by men in the character of executors ; but that matter was left as a fact to the jury, and I take it to be settled by the verdict, that the banks would have accepted such indorsement. The notes were protested, and the executors not waiting to be sued, paid the money and took up the notes ; and after some years they bring this suit against Mr. Owens, claiming from him his contribution ; viz., his share of the instalments of ten per cent. due at the time of commencement of the action.

The defence is founded upon the words of the agreement, which, it is argued, expressly require Shields, the testator, and of course his representatives, to continue the indorsements, and renew them to the end of the ten years, and that the executors, by paying off the notes instead of renewing them, and by be-

[Shields and others, Executors of Shields, v. Owens.]

coming themselves the creditors in lieu of the banks, have forfeited their indemnity and all their rights to the ten per cent. instalments. Now I do not understand such to be the right construction of the agreement. Manifestly the only object was to get credit, to gain a prolonged time of *payment, to enable the congregation to pay off these debts gradually. [*72] The banks were no parties to the instrument. It was not for their profit. The notes were transferable property, and known to be so by the contributors. In substance they have been fairly and legally transferred to these executors; and by the transfer no conceivable injury is done to the congregation, or to the signers of the indemnity, unless it is an injury to their estates or to their credit to owe money to individuals rather than to a bank, and to pay six per cent. interest for it rather than the bank interest of nearly seven per cent. According to the true intent and meaning of the paper, I should say that Shields, the testator himself, by paying off the notes at any time, had he been able, would not thereby have lost his indemnity, provided that in consequence he demanded nothing more than the annual instalments from the signers. But we do not decide that point. The testator did not pay. He continued the indorsement while he lived. He could do it without much inconvenience. But the case seems very different as to the executors. We are all of opinion they took the only fair and practical mode of performing their father's contract, by paying the notes, taking them up and waiting for the yearly instalments for their reimbursement. How they and the other parties to the notes could be able, consistently with the rules of law or convenience, to get along for a series of years, binding by indorsements every ninety days, not themselves but the estate of a man deceased, is a difficulty which need not be settled, because the law is clear that executors having assets, giving a note for a debt due from their testator's estate, though they expressly name themselves executors in the contract, do not thereby bind their testator's estate; but they, themselves, are bound personally. *Geyer v. Smith*, 1 Dall. 347; *Toller's Law of Executors*, 464. Therefore, by indorsing, here would have been six indorsers instead of three, and the executors liable personally for the default, not only of the two original indorsers, but of each other.

It is denied by the plaintiff's counsel, that the engagement by the testator to lend his credit, is that sort of contract which can be legally binding upon his representatives; being but a mere personal undertaking. Without entering into that inquiry, it is certain that the contribution promised by Owens and the rest, being conditional, the condition must be substantially performed somehow before the indemnity can be claimed. We

[Shields and others, Executors of Shields, v. Owens.]

think, that in substance, the condition has been performed by the executors.

In this court and in the court below, the cause has been placed partly on the ground of injury done by the plaintiffs, by not only refusing to indorse, but by demanding immediate repayment of the money to them. Some proof was given that the conduct of the plaintiffs stopped certain payments which would have been made by the members of the church, and was pernicious to the corporation. Upon the credit which the jury might think fit to give to that evidence, the cause was put, in part at [*73] least, by the charge of the court. *It appears to us, that the plaintiffs' demand of the money, if made upon the corporation, was frivolous; if upon the signers of the indemnity, before the instalments, or some of them, had become payable, it was nugatory. Notwithstanding the demand, the executors wisely forbore to sue; and whatever injury has followed, seems to have been produced by a cause too small for the law to take cognizance of. Upon the whole, our opinion is, that there is error, and that the judgment be reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

[PHILADELPHIA, DECEMBER 29, 1828.]

Freytag, Esq., for Himself and Others, *against* Anderson.

IN ERROR.

To entitle a landlord to demand from his tenant security for the payment of three months' rent, or a surrender of the possession of the premises, under the act of the 25th of March, 1825, it is not sufficient that the tenant has removed part of his goods, without leaving sufficient to secure the payment of three months' rent, while he himself remains in possession of the premises.

To give the justices jurisdiction under this act, the removal of the lessee is necessary.

On a writ of error to the court of Common Pleas of Philadelphia county, it appeared that the proceedings in this case arose under an Act of assembly, passed the 25th day of March, 1825, entitled, "A supplement to the act, entitled, an act for the sale of goods distrained for rent, and to secure such goods to the persons distraining the same, for the better security of rents, and for other purposes therein mentioned," the provisions of which are confined to the city and county of Philadelphia.

Michael Freytag, for himself and others, on the 20th day of May, 1826, required Henry Anderson, by a written notice, to give security for three months' rent in five days, for the occu-

[Freytag, Esq., for himself and others, v. Anderson.]

pancy of a house, or to give him peaceable possession, on or before the 26th day of May, 1826. Henry Anderson not complying with the terms of this notice, Michael Freytag, on the 27th day of May, 1826, made an affidavit before two justices of the peace of the county of Philadelphia, that Henry Anderson had then possession, as tenant from year to year, of a certain house situated in Plumb Street, in Southwark; that he had no goods or personal property on the premises, sufficient to satisfy a quarter's rent; but that nearly all had been removed; and that he had demanded security from Henry Anderson, for the payment of three months' rent, or peaceable possession of the premises. In consequence of this affidavit, the justices on the same day, issued their summons to *Henry Anderson, to appear before them on the 3d day of June next, to answer [74] the complaint of Michael Freytag and others, "for having his goods removed from the premises," which he then occupied as tenant of the said Michael Freytag and others, "having refused to give security for three months' rent, or to deliver up possession of the same, on due notice." Such were the words of the summons. On the last mentioned day, the parties appeared before the justices, when the case was continued, till the 8th day of June, on which day the defendant only appeared, and judgment was rendered against him, "that the premises occupied by him, should forthwith be delivered up to the plaintiff." On the 9th day of June, a writ of possession was issued, returnable on the 13th, in which it was again stated, that Henry Anderson, a lessee for years of Michael Freytag, "not having sufficient goods and chattels on the premises leased, to secure three months' rent, had refused to give security for the payment thereof in five days after demand of the same in writing, and had also refused to deliver up possession of the premises; therefore we command, &c." A writ of *certiorari* was afterwards issued to the two justices of the peace, by the Court of Common Pleas of Philadelphia county, by which the proceedings were brought before that court, and on the 22nd day of January, 1827, on a hearing, the judgment of the justices was reversed; and on this judgment of the Court of Common Pleas, the case came before this court by a writ of error.

E. Ingersoll, for the plaintiff in error.—The question is, whether to support proceedings under the act of the 25th of March, 1825, it is necessary that the tenant himself should have actually removed from the premises? What the fact was, as to removal, we do not know. The affidavit states all that the law requires, and the justices have given their judgment upon the facts submitted to them. This, it was clearly the intention of

[Freytag, Esq., for himself and others, v. Anderson.]

the law to leave to the justices, and it is very proper it should be so. The question of removal is often one of great nicety, particularly in the country, where the movements of a tenant cannot easily be observed. A removal of the person, is not required by law, to sanction these proceedings. If the goods, which are all that constitute a home, and furnish a security for the rent, be taken away, it is a removal within the scope of the law. If the evidence given to the justices, appeared upon the record, and showed no removal, there would be some foundation for the other side of the case; but nothing of that sort appears, and as the case was within the jurisdiction of the justices, and they have given a judgment upon a matter they were competent to decide upon, that judgment ought to stand; and the Court of Common Pleas was wrong in reversing it.

I. Norris, for the defendant in error.—The second section of the act requires an actual removal. The doubt arises from the disjunctive, *or shall refuse*, being used instead of, *and shall*. Or may be construed, and 1 Yeates, 319. *White v. The Commonwealth*, *1 Serg. & Rawle, 141. The intention of the [*75] act is clear, from the latter part of the section where the facts to be proved are stated: “and if it shall appear that the lessee has removed,” &c. The spirit and meaning of the act require a removal in fact. The old law, (act of 1772), only provides for the determination of the lease. The mischief was, malicious tenants leaving the premises vacant, and refusing to give up possession. The remedy is sensible and judicious: the tenant has the option to leave sufficient goods on the premises to secure a quarter’s rent, or to give security for it, if he refuses to deliver up possession when he has removed. The legislature did not intend to impose a new burden on tenants. The act speaks of the removal of the lessee, which is a removal of the person. If there is a removal in fact, but a colourable and fraudulent continuance in possession, it is a question of fact, to be decided by the justices.

This is a new mode of procedure unknown to the common law. It does not give a trial by jury in any instance. The rule laid down under the act of 1772, by Gibson, J., in *Blashford v. Duncan*, 2 Serg. & Rawle, 486, is sound, and equally applicable here: leave nothing to construction. The record then does not show a removal of the tenants. Everything required by the act must appear on record. *Fahnestock v. Faustenhauer*, 5 Id. 174.

Reply.—It is not necessary that the justices should state on the record all the facts. Under the old act of 1772, it is neces-

[Freytag, Esq., for himself and others, v. Anderson.]

sary that the inquisition should, for the guidance of the sheriff, who is to execute the writ of possession. But here, the tribunal that decides, issues the writ. In a jury trial, all the necessary facts must be proved to the jury, but they are not found and entered on record. The act does not require that all the facts should be entered on record. Two witnesses, the record states, were examined; the presumption is, that they proved the necessary facts. Every presumption should be made in favour of the proceedings of the justices.

The opinion of the court was delivered by

SMITH, J.—The case appears to this court, to be one clear of difficulty. The act provides for a case, where a tenant or lessee for a term of years in the city and county of Philadelphia, with intent to defraud his landlord, removes from the demised premises, and does not leave sufficient property or goods to pay at least three months' rent, or refuses to give security for the payment of the rent, and to deliver up the possession of the premises; in which case the act gives a remedy. But the case before us is not within the act; for the affidavit, warrant, and record of the proceedings do not state, either that the defendant had removed his goods, with intent to defraud his landlord, or that he is not in actual possession, or that he has removed from the premises, without leaving sufficient property thereon to secure the payment of at least three months' rent; but it is assumed, that a lessee or tenant, who has not sufficient [*76] property to pay the rent, is within the act, although he may not, or has not removed his family or goods with a fraudulent intent, and although he continues in full and complete occupancy and possession by himself and family, and has on the premises all his personal property. This construction given by the justices to the act of assembly is wrong, and the Court of Common Pleas were right in reversing their judgment. The words in the act, "If any lessee shall remove from such premises," run through the whole act, and this fact of removal must appear to the justices, and is necessary to give them jurisdiction. A lessee or tenant who removes, and does not leave property sufficient to pay the rent, or give security for the payment thereof, if required, is within the provisions of the act; but a lessee or tenant who continues in possession, who neither removes himself nor his goods, is not within the same. The judgment of the Court of Common Pleas is therefore affirmed.

Judgment affirmed.

[PHILADELPHIA, DECEMBER 29, 1823.]

In the Matter of the Appeal of John Torr and others,
Administrators of Josiah Torr, deceased.

APPEAL.

On a *certiorari*, from this court to the Orphans' Court, to remove the record, the original record must be returned.

JOHN TORR and others, administrators of Josiah Torr, appealed to this court, from a decree of the Orphans' Court of Philadelphia county, in relation to their accounts. In conformity with the practice, a *certiorari* had been issued to bring up the record; but the clerk of the Orphans' Court declined sending up the original papers in his office, which were voluminous, offering to make copies of them, upon payment of the fees, for so doing, which he insisted he had the right to do. On motion of Wheeler, for the appellants, a rule was granted, upon the clerk, to return the original papers, or show cause why an attachment should not issue against him, with the view of obtaining the direction of the court, as to the course to be pursued, in such cases, by the officer.

Upon the return of the rule, cause was shown on behalf of the clerk of the Orphans' Court.

Wheeler, in support of the rule.—The *certiorari* issues to bring up the record itself. 2 Dall. 190. The appeal only removes the cause. The 11th section of the act creates the Supreme Court, (1 Sm. L. 139,) and gives power to issue *certioraris*. [*77] Cond. Gen. 90, is *an authority, that the *certiorari* removes the record itself, out of the inferior court, and 1 Bac. Ab. 573; F. N. B. 548; Lil. Ent. 252, 353, are to the same point.

Ingraham, contra.—It is perfectly true, that, upon a *certiorari*, the record, itself, is returned, in the condition in which it was when the writ came to the court below, and everything done in the court, between the test and return of it; (1 Tid, 407, 8th Edit.) that is to say, a complete transcript of the record below, and not the mere substance of it. And, the safety of important papers, filed in the Orphans' Court office, requires, that such should be the practice; for they are often lost or mislaid, and titles thus rendered defective. In point of fact, the original papers are never sent up in England. Chief Justice Holt, in *Rex v. North*, 2 Salk. 565, says, "It is an error in

[In the Matter of Appeal of John Torr and others, Administrators of Josiah Torr, deceased.]

the clerks in London, that, upon a *certiorari*, they return only a transcript, as if the record remained below; for, in C. B., though they do not return the very individual record, yet, the transcript is returned as if it were the record; and so it is in judgment of law; and it is in this sense, that a return of the 'record itself,' is to be understood, when used by the writers of books of practice, as is evident from the marginal note of this very case, which is, 'upon a *certiorari* the very record is returned.'"

PER CURIAM.—In every sort of appeal, whether with, or without *certiorari*, the practice is to send up the original papers, as far as is practicable. The dockets cannot be removed, and transcripts of the particular entries, necessarily, supply their place. But here there is a *certiorari* to remove the record; and, where this writ issues from a superior to an inferior court, whatever may be the law in other instances, the original record is to be returned. We are of opinion, therefore, that, to return a transcript, would neither agree with our own practice, nor answer the exigence of the writ, at the common law.

Rule made absolute.

Cited by Counsel, 3 Wr. 172; 8 S. 184.

*[PHILADELPHIA, DECEMBER 29, 1828.]

[*78]

Biddle's Executors *against* Ash.

IN ERROR.

A. and B. in contemplation of marriage, executed a deed, by which a large real estate, being the wife's share and proportion of her late father's real estate, was conveyed to trustees upon certain trusts for her benefit, and in reference to a considerable personal property, "being her share of the personal estate of her late father;" the husband covenanted, that all the purchases of real estate he might make, with the above-mentioned personal property of the wife, which should come to his hands during the intended marriage, should be vested in the wife, subject to certain powers in the husband, and that if, at the time of her decease, he should be in possession of any of the personal property of the wife, received from the estate of her late father, not contracted to be laid out in real estate, he would account to the trustees for the principal thereof: it being understood that he should not be accountable for the interest or rent of any such moneys or estates as might come into his hands during their joint lives.

On the day before the execution of the settlement, a part of the real estate was sold; part of the purchase-money was paid, and bonds given by the purchaser for the residue, which were paid off after the marriage, but no alteration was made in the deed in consequence of the sale.

The husband, after the marriage, received considerable sums of money from the executors of the wife's father, part of which consisted of interest which had become due to that estate after the date of the marriage settlement.

[Biddle's Executors v. Ash.]

Part of the wife's personal estate was laid out by the husband in the purchase of vacant lots, which were conveyed as directed by the settlement, and he expended considerable sums of money in filling up those lots, and curbing and paving in front of them.

After the wife's death, the executors of the surviving trustee brought an action of covenant upon the settlement, against the husband, and it was held,

That the proceeds of the real estate sold before the execution of the settlement, did not pass to the trustees, in the place of the land itself.

That the husband was not bound by his covenant, to account to the trustees for the proceeds of the sale.

That he was not bound to account for moneys received from the executors of the wife's father, in the shape of interest which had accrued subsequently to the date of the settlement; and that he was entitled to credit for the expense of filling up vacant lots purchased in pursuance of the settlement, and for curbing and paving in front of them.

THIS was an action of covenant brought in this court upon a sealed instrument, in these words :

"This indenture tripartite made the fifteenth day of March, in the year of our Lord one thousand eight hundred and four, between James Ash, of the city of Philadelphia, Esquire, of the first part, Rachel Douglass, of the said city, widow, of the second part, and Charles Biddle of the said city, Esquire, and Charles French of the same place, merchant, of the third part. Whereas the said Rachel Douglass is seised to her and her heirs for ever, of the following real estate in the city of Philadelphia, to wit :"—[Then followed a description of a large amount of real estate, consisting principally of unimproved lots, in and near the city. Among other estates described, was an undivided third part of [*79] a three *story brick messuage, kitchen, sugar-house, stores, buildings, and improvements, on a lot of ground situate on the north side of Vine Street, between Second and Third Streets, containing in front one hundred and seventeen feet four inches.] "Being the share and proportion of the said Rachel Douglass, in the real estate of her late father, Jacob Morgan, assigned and allotted to her under two writs of partition, to divide the said Jacob Morgan's estate, lately executed in the Supreme Court of Pennsylvania, as, by the records of the said court, in that case, will more fully appear. And, whereas, the said Rachel Douglass is also possessed of, or entitled to a considerable sum of money, goods and chattels, being her share of the personal estate of her late father, the exact amount and quantity of which cannot, at present, be ascertained; and, whereas, a marriage is intended to be shortly had and solemnized, between the said James Ash and Rachel Douglass, and it is the desire and intention, of both parties, to secure the said real and personal estate of the said Rachel Douglass, in the manner hereinafter mentioned : Now, this indenture witnesseth, that the said James Ash and Rachel Douglass, in consideration of the premises. and of the sum of one dollar, to them, in hand

[Biddle's Executors v. Ash.]

paid, by the said Charles Biddle and Charles French, the receipt whereof is hereby acknowledged, have granted, bargained, and sold, aliened, enfeoffed, released, and confirmed, and, by these presents, do grant, bargain, and sell, aliene, enfeoff, release and confirm, unto the said Charles Biddle and Charles French, their heirs and assigns, all and singular, the hereinbefore mentioned and described messuages, lots, tenements, yearly rent charges, hereditaments, and premises, situated, bounded, and being as hereinbefore mentioned, together with the rights, privileges, members and appurtenances, whatsoever thereunto belonging and appertaining, to have and to hold the same to the said Charles Biddle and Charles French, their heirs and assigns, to the proper use and behoof of the said Charles Biddle and Charles French, their heirs and assigns for ever. In trust, however, and to the use, intent, and purpose following, that is to say: to the use of the said Rachel Douglass, her heirs and assigns, until the said intended marriage shall take effect; and from and after the solemnization of the said marriage, then they, the said Charles Biddle and Charles French, and their heirs, shall be and stand seised of the premises, to the intent, uses, and purposes following, that is to say: to permit and suffer the said James Ash and Rachel Douglass, to take the rents, issues, and profits of all and singular the premises, for and during their joint lives, to their proper use without impeachment of waste; and, from and after the decease of the said Rachel Douglass, in case the said James Ash shall survive her, then, to the use of such person or persons, and for such estates and interests in the premises, and every or any part thereof, as the said Rachel Douglass may and shall, by her last will and testament, or any instrument in writing, by her signed, and attested by two credible *witnesses, in the nature of a [*80] last will and testament, or a testamentary appointment. notwithstanding her coverture, direct, order, limit or appoint. Provided, that no estate or interest in the said premises, or any part thereof, may or shall be limited, devised, or appointed to the use of the said James Ash, for any longer time than during his natural life, 'except in case of the death of the children, which she now has and may hereafter have,' such being the said James Ash's own express desire; and for want of such testamentary appointment, to be made in manner aforesaid by the said Rachel Douglass, she dying before the said James Ash, and also, in case she, the said Rachel Douglass, shall survive the said James Ash, then to the use of the said Rachel Douglass, her heirs and assigns, in fee simple. And the said James Ash, for and in consideration of the premises, doth hereby covenant, grant, promise, and agree to and with the said Charles Biddle

[Biddle's Executors v. Ash.]

and Charles French, that all and every purchase of real estate, which he may and shall make with the above-mentioned personal property of the said Rachel Douglass, which shall come to his hands during the said marriage intended to be solemnized, shall be conveyed to and vested in the said Rachel Douglass, her heirs and assigns. And it is further covenanted, agreed, and declared to be the true intent and meaning of these presents, that the said James Ash and Rachel Douglass, shall and may have power, during the said coverture of the said Rachel Douglass, to grant, bargain, and sell, by way of barter or exchange for other real estate, producing an income, all or any of the unimproved lots of ground belonging to the said Rachel Douglass, or which hereafter may belong to her, or to let out any of the said lots on ground rent. Provided the said real estate, so to be acquired by way of exchange, and all and every the ground rents which may be reserved upon any such lots of ground shall be conveyed or reserved to and vested in the said Rachel Douglass, her heirs and assigns, and all such real estates so to be acquired by way of exchange, and all such ground rents, to be reserved, shall be subject to the same uses and trusts, in all respects, as are hereinbefore declared and appointed. And the said James Ash doth, by these presents, further covenant and agree to and with the said Charles Biddle and Charles French, their heirs and assigns, in manner following, that is to say: that if, at the time of the decease of the said Rachel Douglass, he, the said James Ash, shall be in possession of any of the personal property of the said Rachel Douglass, received from the estate of her said late father, which may not be contracted to be laid out in the purchase of real estate, conformable to the provisions hereinbefore mentioned, then, and in such case, he, the said James Ash, shall and will account, with the said Charles Biddle and Charles French, their heirs or assigns, for the principal of all such moneys, and well and truly pay and satisfy the same: it being understood and expressly declared, that the said

[*81] James Ash shall not be accountable for the interest or *rent of any such moneys or estates that may come to his hands during the joint lives of them, the said James Ash and Rachel Douglass, by reason of their intermarriage as aforesaid. And, further, that in case the said Rachel Douglass shall survive the said James Ash, that then, and in such case, his, the said James Ash's executors or administrators, shall, in like manner, be accountable for, and shall pay and satisfy the principal of all such moneys, to the said Rachel Douglass, without being responsible for any interest or rents that may have accrued during the said coverture. Provided, always, and it is understood and agreed, that, in case she, the said Rachel Dou-

[Biddle's Executors v. Ash.]

glass, shall survive him, the said James Ash, she shall not and will not have or claim any dower or thirds whatever, of, in or to his estate. In witness whereof, &c."

On the fourteenth day of March, 1804, the day before the execution of the above indenture, the heirs of Jacob Morgan, including Richard Douglass, conveyed the sugar-house estate to Edward Pennington.

It was agreed that a verdict should be entered for the plaintiffs for six cents damages and six cents costs, subject to the opinion of the court upon the following points :

1. Whether the defendant is chargeable under his marriage settlement with Rachel Douglass of the 15th of March, 1804, with any and what portion of the money paid by Edward Pennington for the bonds given by him to Rachel Douglass, for the purchase-money of the sugar-house and premises in Vine Street, sold and conveyed by the heirs of Jacob Morgan before the said settlement.

2. Whether the defendant is chargeable for the full amount of moneys paid him by the executors of General Morgan, or is entitled to a credit for so much of the said moneys as consists of interest accrued to the estate of the said General Morgan subsequently to the date of the said marriage settlement.

3. Whether the defendant is entitled to a credit, under the said settlement, for moneys paid to fill up vacant lots, purchased for R. Ash and her heirs, and for paving and curbing opposite the same, or other property purchased by the defendant according to the said settlement.

It was further agreed, that the case, with the opinion of the court upon the above points, should be referred to three referees to be appointed by the court, to adjust the accounts of the parties accordingly, and that in the said adjustment, credit should be given to the defendant for so much of the inventory of the estate of the said Rachel Ash, and the interest thereof, (excluding the furniture therefrom,) as might be necessary to meet the demand of the plaintiffs; and the balance of the said inventory and interest, if any, to be paid to the said James Ash: That the report of the said referees being filed and approved, the court should have power, if anything be due by the defendant, to enlarge the verdict accordingly, and enter *judgment [*82] thereon; or if nothing should be due, to set aside the verdict and enter judgment for the defendant.

Either party to be at liberty, upon the report of the referees coming in, to file exceptions, introducing any other questions, which they may deem material.

T. Sergeant and Chauncey, for the plaintiffs.—1. There are

[*Biddle's Executors v. Ash.*]

two objects which it will be the desire of the court to effect in the construction of this settlement. The first, to preserve as far as it can be done, the legal rights of the wife and her children; the second, to give entire effect, if possible, to the deed. The legal right of the wife and her children, is the preservation of her real estate; and the court will be careful to prevent, if possible, the loss of this right by any mistake or misconception. The only mode of giving full effect to the instrument, is to consider the proceeds of sale to be comprehended in the conveyance of the thing sold. With these two objects in view, what is the sound judicial opinion upon the deed in question? It is not a case of reformation but of construction. Little will be gained of a satisfactory character by speculating upon the views of the parties, by any other lights than those derived from the instrument itself. From the instrument itself, is to be deduced the intention to secure to the wife, subject to the husband's enjoyment during life, her real and personal estate, derived from her father in the division of his estate. This is manifest from the recital and the description in the deed. The sugar-house, sold the day before the execution of the settlement, was a very important part of that estate, and is treated as such in the instrument. Notwithstanding the prior sale, it is included in the deed as if it were still the property of the wife. It is plain that the intention was to settle this part of her property, and as the land had been sold, but the price remained to be paid, it was intended that the proceeds of sale should be settled under the description of the land itself. The court will, therefore, substitute the money for the land. To the suggestion, that the land having been sold the day before the execution of the deed, it did not pass to the trustees, and that to substitute the money in the place of it, would be to make a new contract for the parties, it may be answered, that the parties certainly meant something by the introduction of this estate into the deed. It was not matter of form; some substantial purpose was in view, and the only mode of giving effect to this part of the instrument, is to consider the parties as preserving the intention they had before the sale; that of including this portion of the property in the settlement. They knew on the 15th, that the sale had taken place on the 14th, but they considered the money or the bonds of the purchaser, the same as the land, and, therefore, made no alteration in the instrument. The inference, that the wife knew the legal effect of a conversion of the property, and meant that the conversion should be followed by its legal consequences, is inconsistent with the retention of *this part

[*83] of the estate in the deed of settlement. The only reason that can be assigned for the execution of the instrument in the

[Biddle's Executors v. Ash.]

form in which it stood is, that the parties intended that the conveyance in its existing form, should carry the money. No other motive can be imagined. This part of the deed could not have been left in as mere surplus matter, not of sufficient importance to call for another instrument. The settlement was executed with consideration and care, and no part of it can be considered as immaterial, if effect can be given to it. By considering the land, as including or representing the price to be paid for it, effect is given to the whole instrument; otherwise, this part of it is a dead letter; and thus the general intention of the parties, which was to secure the wife's property to herself and her children, is frustrated by a very large portion of it being swept away on the eve of marriage. This construction is the most rational and satisfactory that can be given to the instrument in question.

Does the court possess the power to give it this construction? The court will construe a settlement according to the intent of the parties, though contrary to its literal expressions. 3 Br. C. C. 569; 2 Eq. Ab. 28; 1 Fonb. 136, 188, 190. Words describing the subject of a grant, are very different from words limiting the estate granted. The latter are technical and the rule of law settles their construction: the former are not so, and are to be governed by intention. *M'Williams v. Martin*, 12 Serg. & Rawle, 269. In the present case, the court cannot carry the settlement into effect, literally, by saying that the land passes to the trustees, because it has been conveyed to another; but they may give substantial effect to the instrument, and fulfil the intention of the parties, by saying, they have agreed that the money shall stand in the place of the land. This construction injures no one. It does not injure the husband, because he agreed, by the settlement, that the land should be secured to the wife; and he is placed in no worse situation by its conversion into money. The substance of his agreement was, that her property should be secured, and equity requires that he should fulfil his agreement. These remarks apply to the general scope and character of the instrument.

The next question is, does the covenant of Mr. Ash embrace this money? It does so in terms. If, at the time of the decease of Mrs. Ash, he should be in possession of any of her personal property, received from the estate of her father, not contracted to be laid out in the purchase of real estate, he covenanted to account for the principal thereof to his wife's trustees. The money in question is personal estate of his wife, received from the estate of her late father; and if the letter of the instrument is to govern, the case is within the covenant.

2. Mr. Ash was to enjoy the interest of any moneys which

[Biddle's Executors v. Ash.]

might come into his hands, from the time they so came into his hands, during the coverture; but there is nothing which gives [*84] him a larger interest. *The personal property, at the execution of the settlement, was not ascertained; when ascertained, it was to be paid, by the executors, to the trustees; and then, but not until then, the right of Mr. Ash to the profits attached. His covenant, accordingly, is to account for the principal of all moneys coming into his hands, but not for rents or interest. Upon the literal construction of this covenant there can be no doubt; and the spirit of the settlement accords with it.

3. The expenses referred to in the third point, are of two kinds; first, Filling up vacant lots. Secondly, curbing and paving. They were either voluntarily incurred, or incident to the tenancy. If voluntarily incurred, and for the improvement of the property, there is no pretence of legal right to have them allowed. If they were incident to the tenancy, and no charge on the estate, he has as little legal right to an allowance. If they were a charge on the estate, he equitably represents the charge, and the burden must be apportioned between him and those in remainder.

Tilghman and *Binney*, for the defendant.

1. The action is covenant upon the deed of the 15th of March, 1804; and the question is, whether there has been any breach of the defendant's covenants contained in that instrument? If no covenant was broken in not accounting for the money received on Pennington's bonds, Mr. Ash is not chargeable with it. The case does not present the question, whether that money ought to be regarded as land; and if it does, the money was hers, to do as she pleased with; and she has not chosen that it should be settled to her separate use. The clear interpretation of the deed is, that Ash's covenant is expressly confined to the personal estate of Jacob Morgan, belonging to Rachel Douglass, and does not extend to the proceeds of the sale of his real estate. With the particular real estate described in the settlement, he had nothing to do, as it passed to the trustees. As to her share of her father's personal estate, he has covenanted, that all the purchases he should make with it, should be conveyed to his wife, her heirs and assigns, subject to certain powers of letting and exchanging; and if, at her decease, he should be in possession of any personal property of the said Rachel Douglass, received from the estate of her said late father, not contracted to be laid out in real estate, according to the previous provision, he further covenanted to account, to the trustees, for the principal. The last covenant was supplementary to the first. They both related to the same personal estate, viz., the personal prop-

[Biddle's Executors v. Ash.]

erty received from the estate of her father; and not to the proceeds of his real estate. This construction cannot be avoided. No personal property, except what was the personal property of Jacob Morgan, is assigned to the trustee. There was no intention to provide for any other, by any provision in the instrument. There is no knowledge of the existence of such personal estate as the bonds of Mr. Pennington, shown in Mr. Ash, who was an utter stranger *to the sale of the sugar-house estate. [*85] To make a covenant at law, as to these bonds, by the terms of the settlement is impossible. It is equally impossible so to reform the settlement, in equity, as to make a new covenant at law.

As to the general question of equity, if anything could be done, it would be to put the bonds in the same situation as the sugar-house; to transfer them to the trustees to be invested in lands upon the same trusts. But, such was not the destination of the personal property mentioned in the deed, which was to be invested in real estate, in the name of Mrs. Ash, heirs and assigns: consequently, the reformation of the deed would not affect his covenant, as he had nothing to do with the matter reformed. But, to justify any change in the instrument, that must be proved which cannot be proved. There is no evidence of any mistake or misapprehension, on the part of Mrs. Ash, at the execution of the deed. She knew that this estate had been sold before the settlement, and, that, therefore, it did not pass. She received part of Pennington's first payment, and used it as she pleased. When the bonds were paid off, she received three thousand dollars from Ash, which she disposed of as she thought proper. Her trustees knew this, and never made a claim in her lifetime. She died in 1817, and no suit was instituted till 1824. It does not appear to have been intended to tie up all her property: other real estate of great value, derived from her father, and personal property, in her possession, derived from her former husband, were not included in the settlement. Her intention, in respect to the sugar-house estate, as declared in the deed, was changed, as her own act, before its execution proved. There was merely an omission, on her part, to strike out this part of the deed. But, the mistake of Mrs. Ash, if it were shown, would not be sufficient to justify the reformation called for. The mistake, both of the husband and wife, must be shown, and there is no evidence of mistake on the part of Mr. Ash. He assented to the settlement, as it was offered, supposing the estate to be described. Had he known of the previous sale there is nothing to show that he would have assented to settle the money. No intention appears, in him, to settle the personal estate, derived from the real estate of Jacob

[Biddle's Executors v. Ash.]

Morgan. This is not a deed which chancery would alter. It is a marriage settlement executed, of very land, and very personal estate. Nothing else is included, and, with such a settlement equity would not meddle, except from evidence *aliunde*. The case of articles, and a settlement in pursuance of them, is peculiar. The court will not reform a settlement, according to the articles, where both are made before marriage, unless the settlement be declared to be in pursuance of the articles; for, before marriage, the parties may alter their intention, as to the terms of it, though they cannot afterwards. The court will, therefore, suppose that the settlement was made in pursuance of the new agreement, and not of the articles. But, with a deed completely executed, as this was, before marriage, equity [*86] will not *interfere. Fearne, 90 to 110; Madd. Ch. 61; 1 Fonb. 136, (note,) 396. The intention of the settler, in relation to the sugar-house estate, was certainly altered. It was altered as to its passing as real estate; and there is nothing to show a new intention to pass it as personal estate. If the court alter this deed, they must make a new settlement, and impose new covenants on the defendant, or decree that the trustees recover this money, and invest it upon the same trusts which were intended, in respect to the sugar-house, before the sale, for which there is no warrant.

2. The question, in relation to the interest, is easily disposed of. The defendant was entitled to his wife's personal property, *eo instanti* of the marriage. Whatever interest it accumulated after the marriage, was his. He was responsible for none which accrued during coverture, no matter into whose hands it may have come.

3. The defendant covenanted to invest the personal estate of his wife, derived from her father, in real estate, to be conveyed to her, her heirs and assigns; and, that if any of that money should remain in his hands, at her death, not contracted to be laid out in real estate, he would account for it with the trustees. He laid out money in the purchase of vacant lots, for which he is credited. He also laid out money in filling up those lots, and in curbing and paving in front of them; and the question is, whether or not he is entitled to credit for those expenditures? He, clearly, is entitled to such a credit. The money thus expended, formed part of the price of the lots. A lot, before it is filled up, is worth one sum; when filled up, it is worth a greater sum. The cost of the lot, therefore, consists of two parts; the price paid for it before it is filled up, and the money expended in filling it up, and putting it in a situation to be used according to the city regulations. The same remark applies to the curbing and paving. If these expenses had been incurred

[Eiddle's Executors v. Ash.

immediately after the purchase, no doubt would have existed; their having been incurred after a considerable lapse of time, can make no difference. The principle is not affected by time. The defect does not arise after purchase, but is a pre-existing and permanent one. Until the lots are filled up, they can yield no revenue. This expense, therefore, enters into the prime cost of the land, and should be credited to the defendant, as coming within the words, and certainly within the spirit of the covenant. It was incurred for the benefit of the wife and her heirs, and consequently, the question, how the burden shall be apportioned between the tenant for life, and the remainder man, does not arise.

The opinion of the court was delivered by

GIBSON, C. J.—It is conceded, that this is not a case of accident or mistake, calling for the intervention of a chancellor to reform the instrument; but one purely of construction. At law, it is the case of a contract executed, and passing nothing but real estate, actually *in the grantor at the time of the [*87] delivery; and it can be turned into an agreement in equity, only to subserve some clear and indisputable intention inconsistent with the legal effect of the instrument. Here that effect is to pass nothing; for nothing, as regards the Vine Street property, the proceeds of which are in contest, was in the parties. The only case in which an interest, resembling the present, has been held to pass by a conveyance of the land, is that of a grantee of lands, within the seventeen townships which had been certified to a Connecticut claimant; (*Evans v. The Commonwealth*, 2 Serg. & Rawle, 448,) and there the grantee was permitted to recover the compensation allowed by the state; but only because it was considered, that before compensation made, the divestiture was incomplete. What proof then have we that the proceeds of the Vine Street property were intended to be substituted for the property itself? The actual intent can neither be ascertained nor conjectured. The parties may possibly have supposed, that the proceeds would be covered by the defendant's covenant to account for his wife's personal property, derived from her father's estate, of which he should be possessed at her death; and if such a supposition were clearly disclosed, it might, perhaps, give rise to an equity which we ought not to disregard; or, what is more probable, they may have intended to withdraw the property from the operation of the settlement together; and, for either of these reasons, a new conveyance, adopted to the altered circumstances of the case, may have been deemed unnecessary. But the first is inconsistent with the notion, which has been earnestly pressed on us, that

[Biddle's Executors v. Ash.]

the proceeds passed by the grant of the property itself; with, or without which, I am unable to perceive how the plaintiff can make out a case. If they pass by this, which is the only operative clause in the deed, they did so with all the attributes of real estate, and subject to the uses and limitations expressly attached to them as such; consequently, the defendant would be entitled, during his life, as tenant by the curtesy. If they did not pass by that clause, then the deed contains no clause applicable to them; and the act of turning the property into personalty, would have the effect of subjecting it to the defendant's marital rights, and giving it to him absolutely. For it is only by introducing the proceeds into the settlement, as a substitute for the estate, that they can be made out to be the personal property of the wife, and subject to the husband's covenant to account for them as such, being derived from her father's estate. But it is impossible to treat the proceeds as real estate, only for the purpose of giving the wife an interest, and personal, for the purpose of subjecting it to the husband's covenant. It may be either the one or the other; but it will, necessarily, be attended, throughout, with all the incidents of the character, which we shall first attribute to it; and this is a dilemma from which I see no escape.

The true construction is, however, that it did not pass at all. [*88] *That the parties intended to include the Vine Street property, when the conveyance was prepared, is perfectly clear; but it is equally clear that they had changed their intention when it was executed. It is nearly impossible to refer their having parted with the title, in the meantime, to any other motive. If there were no other estate on which the conveyance could operate, that would make the case a perplexing one; perhaps any construction would be adopted to prevent the deed from becoming a nugatory act. But here, there was a large estate besides, which passed by the conveyance. It was, no doubt, believed, that the retaining of the clause which relates to the Vine Street property, could do no harm, as nothing was left for its operation; and the existence of it is attributable to a change of intention, without a correspondent change in the terms of the conveyance having been deemed necessary. An analogous construction is always adopted in the case of a settlement preceded by articles, and executed before the marriage; which will not be reformed so as to render it conformable to the articles, unless it purport to have been made in pursuance of the articles, or there be proof of mistake *dehors*; the variance being attributed to a change of intention, which the parties had a right to make. Here there is nothing to indicate the existence of any but a partial change of intention, or, if there were, to raise an equity

[Biddle's Executors v. Ash.]

from it; the legal construction being the natural one,—that the parties intended to withdraw the Vine Street property from the settlement altogether, leaving the proceeds of it to the legal consequences of the marriage. A contrary intent, clearly and explicitly made out, is necessary to the success of the plaintiff's case; without which we cannot hold the defendant accountable.

That the defendant is not bound to account for moneys received from the executors of the wife's father, in the shape of interest, which accrued subsequently to the date of the settlement, when he became entitled to the use of the principal, is so entirely consistent with reason and the intention of the parties, that it is but necessary to state the proposition, without entering into a particular discussion of it.

The remaining inquiry is, whether the defendant is entitled to a credit for filling up certain vacant lots which he purchased for the benefit of his wife, pursuant to the settlement, and for paving and curbing opposite to them. The paving and curbing, it seems, were required by the ordinances of the city, and it has very properly been conceded, that this part of the charge is unobjectionable. But I cannot perceive how expense incurred in filling up and rendering the lots productive, can be distinguished from it. The settlement ought, in this respect, to be beneficially construed in favor of the object, and all this expenditure may, therefore, be fairly put down to the original cost. On all the points we are of opinion with the defendant.

Judgment for the defendant.

Cited by Counsel, 10 Barr, 392; 2 W. N. C. 673.

In *Rice v. Rice*, 2 W. N. C. 672, the settlement was made after marriage, and the sale of the land after the settlement, and it was held that the sale worked a conversion and the rights of the husband attached.

*[PHILADELPHIA, DECEMBER 29, 1828.]

[*89]

In the Matter of the Petition of Henry Shoemaker.

Where, in a deed conveying land, and reserving a rent charge, the grantor covenants, upon the grantee paying, within seven years, a gross sum, together with all arrearages, &c., to release and discharge the rent, the grantee cannot, after the lapse of eighteen years from the time prescribed in the deed, call upon the grantor to perform his covenant.

THIS case came before the court on a petition presented by Henry Shoemaker, under the act of assembly of the 5th of February, 1821, entitled, "A further supplement to an act entitled, 'An act to enable executors and administrators, by leave of court, to convey lands and tenements, contracted for with

[In the Matter of the Petition of Henry Shoemaker.]

their decedents, and for other purposes therein mentioned, passed the thirty-first day of March, 1792.”

The petition, in substance, set forth John H. Brinton, and Jonathan W. Condry, of the city of Philadelphia, Esqrs., by their deed on the 7th of May, 1803, granted to Henry Hurst, in fee, a certain lot of ground, situated on the south side of Sassafras Street, between Delaware Eighth and Ninth Streets, in the said city, reserving to the grantors, their heirs and assigns, a ground rent of fifty-three dollars and thirty-three cents per annum: That, by the said deed, it was provided, “that if the said Henry Hurst, his heirs and assigns, should, at any time within seven years, pay or cause to be paid, to the said John H. Brinton and Jonathan W. Condry, their heirs and assigns, the sum of eight hundred and eighty-eight dollars and eighty-four cents, and all arrearages of rent to the time of payment, then the same should, for ever thereafter, cease and be extinguished, and the covenant, upon payment thereof, should become void, and then the said John H. Brinton, and Jonathan W. Condry, their heirs and assigns, would execute a release and discharge of the said yearly rent, to the said Henry Hurst, his heirs and assigns for ever. That the said John H. Brinton and Jonathan W. Condry, for themselves, their heirs, executors, and administrators, covenanted that the said Henry Hurst, his heirs and assigns, paying the rent and taxes, or extinguishing the same, and performing the covenants, should hold the said lot of ground, and receive the rents and profits thereof without molestation from the grantors, or any persons claiming under them: That, by sundry mesne conveyances, the title to the said rent charge became vested in John D. Coxe, who died, having appointed Daniel W. Coxe, Joseph Reed, and John Watmough, his executors: That the petitioner had become legally seised in fee of the said lot of ground, subject to the covenants running with the land, as contained in the above deed to Henry Hurst: That the conveyance of the said lot of ground, upon the condition that he would pay the sum of eight hundred and eighty-eight dollars and eighty-four cents, to the grantors, within seven years, the petitioner conceived to be, in equity, a mere loan of money *by the pledge of the estate, in the nature of a [*90] mortgage: That the covenant to pay the said sum of money, by the said Henry Hurst, could now be substantially performed by the petitioner, according to the real intent and meaning of the parties: That the deed contained no provision restricting the said Henry Hurst, or his assigns, as to the time of paying the said sum of money; but, only, that he should not be called upon by them, to pay it within seven years; and, on the contrary, it was provided, that if the said Henry Hurst, his

[In the Matter of the Petition of Henry Shoemaker.]

heirs or assigns, should extinguish the said rent, they should hold the lot freely, peaceably, and quietly for ever; and take the rents and profits thereof, without any molestation, interruption, or eviction of the grantors, or their heirs, or any other persons claiming under them. The petitioner, therefore, prayed the court to make an order, authorizing and requiring the executors of John D. Cox, on payment to them of the arrearages of the said rent, with the interest that might be due thereon, together with the additional sum of money mentioned in the deed, to make and execute a sufficient release or discharge of the said yearly rent, to the petitioner, according to the true intent and meaning of the parties.

Upon this petition, a citation issued to the executors of John D. Cox, returnable on the 15th of December, 1828, to answer the complainant on his petition.

Davis, for the complainant.

Reed, for the respondents.

PER CURIAM.—The petitioner insists on a right to redeem, after the lapse of eighteen years from the period fixed by the parties, on the ground, that, in equity, time is not of the essence of the contract. It is, however, clearly so here. The rent charge happens to be of more value now, than the sum prescribed in the conveyance to be paid for it. Hurst stipulated for seven years, in which to make his election, and the petitioner, claiming under him, demands twenty-five. No compensation is offered, nor could we enforce the acceptance of it, without driving the respondents into a new contract. Had the rent charge been of less value than the money, the petitioner could not have been compelled to redeem; and the prayer is, therefore, manifestly inequitable.

Petition dismissed.

*[PHILADELPHIA, DECEMBER 29, 1828.]

[*91]

Duffield and Others *against* Brindley and Others.

An exemplification of a deed dated the 23d of June, 1696, acknowledged in open court on the 4th of August, 1696, and recorded the 27th of October, 1740, held, to be admissible in evidence, the original deed having been lost.

THIS was an ejectment for a lot of ground on the north-east corner of Walnut and Fifth Streets, in the city of Philadelphia,

[Duffield and others v. Brindley and others.]

tried before Mr. Justice Rogers, and a special jury at *Nisi Prius*, on the 24th of November, 1827.

The plaintiffs showed title in Caleb Pusey, and gave in evidence an exemplification of a deed from Caleb Pusey to Daniel Jones, which bore date 9th month 19th, 1690, was acknowledged in open court 10th month 2d, 1690, and was recorded 10th month 29th, 1690. The plaintiffs claimed as heirs of Daniel Jones.

The defendants contended that if Daniel Jones ever had any title to the premises in dispute, he had conveyed it to David Lloyd, by deed bearing date the 23d of June, 1696; and offered in evidence a paper purporting to be an exemplification of the said deed, which appeared to have been acknowledged in open court on the 4th of August, 1696, and recorded on the 27th of October, 1740. They produced the book of the Recorder of deeds of the city and county of Philadelphia, and showed about sixty instances in which deeds had been recorded under similar circumstances. To the paper thus offered the plaintiffs' counsel objected, but the court admitted the evidence, the plaintiff having leave to move for a new trial, on the ground that the paper was not competent evidence. A motion for a new trial was accordingly made, and the only question was, whether or not the evidence was properly admitted.

Rawle, Jr., for the plaintiffs.—From the face of the paper it appeared, that the alleged deed was not acknowledged or proved in such a manner as to entitle it to be recorded, and consequently, an exemplification of it was not evidence. The objection is not captious and formal, but solid and substantial. The paper is offered instead of the deed itself, to show that the title has passed out of the plaintiffs' ancestor; and where a statutory substitution is made of such secondary evidence, for evidence of a primary character, the statute should be, at least substantially, complied with. If the original deed had been produced, it might have been liable to many objections apparent on the face of it, over which a veil is now drawn. A strict scrutiny, therefore, is called for, particularly in a case in which the exemplification shows, that the deed was not recorded until forty-four years after its date.

The act of 1715, 1 Sm. L. 94, prescribes the manner in which deeds shall be acknowledged or proved to entitle them to be recorded, *and declares, that of all deeds so enrolled, [*92] exemplification shall be evidence. Unless, therefore, the acknowledgment or probate be according to the terms of the law, the enrolment avails nothing, either for the purpose of conveying notice to subsequent purchasers, or of making exempli-

[Duffield and others v. Brindley and others.]

fications evidence. *Simon v. Brown*, 3 Yeates, 186; *Heister v. Fortner*, 2 Binn. 40; *Downing v. Gallagher*, 2 Serg. & Rawle, 455; *Vickroy v. M'Knight*, 4 Binn. 209; *Doe v. Roe*, 1 Johns. Cas. 402. When the deed from Jones to Lloyd was recorded, the only act in force relating to the subject, was that of 1715. Prior to that period, several acts had been passed, some of which had been repealed, some had expired by their own limitation, and others continued in force until the act of 1715 was passed, (Province Laws, Appendix, in which the several acts are to be found.) The act of the 10th of March, 1683, Prov. L. App. 9, which directs deeds to be acknowledged in open court and enrolled, and makes exemplifications evidence; and that of June, 1693, Prov. L. App. 14, which declares that deeds need not be enrolled, but that if enrolled, exemplifications shall be evidence, were in force when the law of 1715 was enacted. The act of 1715 was not a supplement to the existing laws, but introduced an entirely new system, providing differently for the same cases, and, therefore, excluding the operation of the old laws. It contained no repeal in terms, but it was inconsistent with the pre-existing laws, and, therefore, repealed them. 6 Bac. Ab. 372; *Rex v. Cator*, 4 Burr. 2026. If, then, the paper was evidence, it must have been so by virtue of the act of 1715, with the provisions of which, it certainly does not comply. The deed was acknowledged agreeably to the laws in force at that time, and, had it been recorded while those laws were in operation which authorized deeds so acknowledged, to be recorded, an exemplification would have been admissible. But it was not recorded until many years after those laws had ceased to exist. Having been duly acknowledged under a law which had been repealed, would not entitle it to be recorded under a subsequent law which required deeds to be acknowledged in a manner totally different, in order to be recorded. The 2d and 3d sections of the act of 1715, declares, that before any deed shall be recorded, the grantor shall acknowledge it, or its execution shall be proved by two or more witnesses before a justice of the peace of the proper county or city where the lands lie, who shall, under his hand and seal certify, such acknowledgment or proof on the back of the deed, with the day and year when the same was made, and by whom; and the fifth section declares, that copies or exemplifications of all deeds so enrolled, shall be admitted in evidence. The deed in question was not acknowledged or proved before a justice of the peace of the proper county, but in open court, and instead of being certified under the hand and seal of a justice, the seal of the court was affixed to the certificate which does not state by whom it was acknowledged. It has, in-

[Duffield and others v. Brindley and others.]

[*93] deed, been held, that an acknowledgment *before a judge of the Supreme Court, is good; but that was upon the ground that the judges of that court are justices of the peace throughout the state. It does not, however, appear that the judges of the court before whom this acknowledgment was taken, were justices of the peace. The circumstances of the deed having been acknowledged agreeably to a pre-existing law, does not entitle it to be recorded under the act of 1715, which authorizes such deeds only to be recorded as shall be acknowledged or proved in the manner pointed out, and makes no provision for deeds already acknowledged or proved. If the evidence be rejected the defendants have no reason to complain. The fullest opportunity was afforded to have the deed in question regularly recorded. No less than 19 years elapsed after its acknowledgment before the passage of the act of 1715, and it was not until 25 years more had passed away that it was put on record. If under such circumstances it is in the power of a party to make a copy evidence, a wide door to fraud is opened. The fact that other deeds have been recorded under similar circumstances, does not prove a co-temporaneous construction of the law. The acts of interested individuals, who are endeavouring to repair the effects of their own laches, and to make evidence for themselves and those who are to come after them, cannot fairly be considered as giving a construction to the law. How little this sort of construction will weigh with the court, is shown in *Kirk v. Dean*, 2 Binn. 340, in which, although out of 611 conveyances by husband and wife after the act of the 24th of February, 1770, only 25 conformed to the provisions of the law, a majority of the court held that this could have no influence with them in construing the act. To say that the paper was admissible as an exemplification of an ancient deed, under which the possession has gone, is begging the question. There was no evidence whatever as to the possession.

The deed from Pusey to Jones is not liable to the same objection. It was recorded while the laws authorizing deeds acknowledged as that was, to be recorded, were in full force.

Barelay, (with whom were *Binney* and *Chauncey*,) for the defendants.

The plaintiffs' claim is a very stale one, and not entitled to any favour. More than 130 years have elapsed since those under whom they claim parted with their interest. The plaintiffs have never been in possession, nor have they ever had a right of possession. The defendants have always been in possession under their title. The court will presume everything in their favour, even if the case be doubtful. The Mayor of Hull v.

[Duffield and others v. Brindley and others.]

Horner, Cowp. 102. But in this case no doubt can possibly exist because,

1. The deed from Jones to Lloyd was entitled to record under the act of assembly of 1693, and if so an exemplification was evidence.

2. The deed, even according to the plaintiffs' construction of the act of assembly, was entitled to record under the act of 1715.

*3. It was evidence, being the exemplification of an ancient deed, which had been lost. [*94]

1. It is admitted that the original deed has been lost. The deed was acknowledged in open county court on the 23d of June, 1696, agreeably to the directions of the act of the 10th of March, 1683, (Hall & Sellers' Edition of the Laws, Appendix 9), and was entitled to record under the act of 1693. (Hall & Sellers' Ed. of the Laws, App. 14). The law did not make it necessary to record any deed, but if recorded, it made an exemplification evidence. The act of 1693, has never been repealed. There is no repealing clause in the act of 1715, and no mode is pointed out by that act for the recording of deeds executed prior to 1715. The legislature, if they had intended to repeal the act of 1693, would have pointed out some mode for the record of deeds prior to that act; the repeal would have been stated expressly, if so intended. There is no incompatibility in the existence of the two laws together. A deed acknowledged prior to 1715, and acknowledged in conformity to the act of 1683, is entitled to record. That the construction the defendants contend for is the true one, the record will show.

2. The deed was acknowledged before a justice of the peace, because the county court was held by justices of the peace, and by them only. Act of the 10th of May, 1684, sect. 156, MS. Act of 1700, Hall & Sell. p. 4.

In support of the 3d point, that, as the exemplification of an ancient deed, the paper was evidence, he cited *Garwood v. Dennis*, 4 Binn. 314, particularly the opinion of C. J. Tilghman.

The opinion of the court was delivered by

SMITH, J.—It was truly observed on the argument here, that the claim of the plaintiffs, was a stale one, and not entitled to favour, for since the deed from Daniel Jones, (under whom the plaintiffs claim,) to David Lloyd, more than one hundred and thirty years have elapsed. At that time he parted with his interest in the lot of ground; and there is no evidence that he subsequently conveyed, or offered to convey, the property in dispute, to any other person, or ever claimed it; but the defendants, or those under whom they claim, have continued in the

[Duffield and others v. Brindley and others.]

possession thereof under their title. The deed which is admitted to have been lost, appears to have been acknowledged in open court in August, 1696, according to an act of assembly of the 10th of March, 1683, and under an act of assembly passed in 1693, it might have been recorded. The act of 1715, does not in terms repeal the act of 1693, nor does it direct how deeds, executed and acknowledged before the year 1715, shall be recorded; and why then a deed acknowledged prior to the year 1715, and in conformity to the directions of the act of 1683, should not be entitled to record, I confess I cannot see. The plaintiffs' deed was acknowledged in the same manner; other deeds of that period have been acknowledged in the same way, and recorded [*95] *after 1715, as appears from deed books produced by the defendants, in which more than sixty deeds were acknowledged as the defendants was, and recorded after the recording act of 1715.

In 1696, when this deed was acknowledged, the county court, before whom it was done, was held by the justices of the peace, and by no other persons, as appears from the 156th section of the act passed on the 10th day of May, 1684, and it may, therefore, with great propriety, be said, that the deed was, in fact, acknowledged before a justice of the peace, and this, it is admitted, would be a sufficient acknowledgment: if so, it is too late, at this time of day, to say, that the deed in question, was not duly recorded. If duly recorded, it is hardly necessary to add an exemplification thereof, was evidence. We then have the case of a lost deed, bearing date in June, 1696, of course a very ancient deed, with which, it appears, the possession of the property has gone ever since. In such a case, a court presumes, after the lapse of so great a length of time, everything to have been done correctly, as was decided by this court, in *Garwood v. Dennis*, 4 Binn. Rep. 314. On every principle of law applicable to this case, the exemplification of the deed was competent evidence: a new trial cannot, therefore, be granted; but the rule must be discharged, and judgment rendered for the defendants on the verdict.

New trial refused, and judgment for defendants.

Cited by Counsel, 2 Barr, 251.

[PHILADELPHIA, DECEMBER 29, 1828.]

Smull *against* Mickley and Another.

It is no objection to the validity of the title of a purchaser at sheriff's sale, that the *renditioni exponas* was not returned until long after the acknowledgment of the sheriff's deed, and long after the sheriff who made the sale, had gone out of office.

THIS was an ejectment originally brought in the Court of Common Pleas of *Lehigh* county to December Term, 1825, and removed by *habeas corpus cum causa*, to the Circuit Court of the same county, where it was tried on the 16th of April, 1828, before the Chief Justice.

The plaintiff, on the trial of the cause, claimed the land in controversy as devisee under the will of George Smull, deceased, and gave in evidence the said will, dated August 3d, 1815, and proved October 12th, 1815.

The defendants set up the following title in themselves:—George Smull, being indebted at the time of his death to Jacob Schrieber, an amicable action in debt was entered in the Court of Common Pleas of *Lehigh* county, in which said Schrieber was plaintiff, and Peter Smull, executor of the last will, of the said George Smull, deceased, was defendant to December Term, 1817. Judgment by *confession was entered in this suit [*96] on January 9th, 1818, for the plaintiff, in the sum of eight hundred and sixty-three dollars seventy-two cents, with costs, &c. A *feri facias* was issued on this judgment to August Term, 1818, and the sheriff levied upon two tracts of woodland as the property late of George Smull, deceased. One of these tracts, supposed to contain seventeen acres eighty perches, comprised the land for which this ejectment was brought. The property levied on being woodland and so returned by the sheriff, no inquisition was held upon it, and a *renditioni exponas* to November Term, 1818, was issued, upon which a sale was made by the sheriff, which was set aside by the court. The entry on the docket was as follows: "December 1st, 1818. On motion, sale and execution in the above case, set aside." An *alias renditioni exponas* was then issued to February Term, 1819, in virtue of which the sheriff again sold the said tract of woodland, containing about seventeen acres eighty perches, to Jacob Schrieber, plaintiff in the suit, for ten hundred and eighty-five dollars.

On the 2d of February, 1819, a rule was obtained to show cause why this sale should not be set aside, in relation to which, on same day, an entry was made in the docket in these words:

[Smull v. Mickley and another.]

“Rule discharged, and defendants to have two months to pay the debt, interest, and costs; and if paid, sheriff to return *venditioni exponas* unsold for want of buyers; otherwise sale confirmed, and sheriff to deliver the deed accordingly.” The sheriff, on the 3d of February, 1819, executed a deed for the said seventeen acres eighty perches, and acknowledged it on the same day in open court, but retained the same until the two months had expired, when the defendants in *Schrieber v. Smull's* Executors, not having complied with the above order or decree of court, he delivered it to the purchaser, Schrieber. The *alias venditioni exponas* was returned November 27th, 1827, long after the sheriff had gone out of office. Jacob Schrieber and wife conveyed part of this land to Jacob Mickley, one of the defendants in the present cause, and the remainder to Henry Byle, the other defendant. The deeds by which these conveyances were made, were both dated on the 3d of June, 1820 and were duly recorded.

The jury, under the direction of the Chief Justice, found a verdict for the plaintiff, and the defendants' counsel moved for a new trial, which having been refused, an appeal was entered to the court in bank, where the cause was argued by *Stroud* for the appellants and *Brooke* and *J. M. Porter* for the appellees upon several points, only one of which, however, is noticed in the opinion of the court, which was delivered by

TOD, J.—In this ejectment the plaintiff claimed the land under the will of his father, George Smull, deceased. The defendants held under a sheriff's deed, in pursuance of a judgment against Peter Smull, the executor of George Smull, for a debt of the testator. On the trial in the Circuit Court, sundry objections were *made by the plaintiff to the validity of [*97] the defendants' title under the sheriff's sale. All these objections are deemed by us unavailable. They were all deemed so by the judge who tried the cause, except one. The *venditioni exponas* on which the land was sold, had not been returned by the sheriff until after the acknowledgment of his deed in court. In fact, there was no return of it till long after the sheriff's office had expired. The judge decided this to be a fatal defect. Upon further reflection, he now thinks his decision to have been erroneous, and we all think so. The negligence of sheriffs to return their writs of *venditioni exponas*, after sales of land, has been by no means uncommon in many counties. It is a negligence much to be censured. The papers ought to be in their proper places. Some courts have made a general rule against receiving the acknowledgment of a deed before the writ is returned. But it would seem hard to begin now to visit this old

[*Smull v. Mickley and another.*]

fault of the sheriff upon the vendee, who has no agency in the matter, and who may well be allowed to presume that every thing done by the court is done in due form. To sustain the objection might be very hurtful to the security of titles. The return is not always made a matter of record any further than by indorsement on the writ. I believe the precise date of the return is never set down. Whatever of form or substance there can be in a *venditioni exponas* may be made out by the *fieri facias* and docket entry, aided by the common forms of the office, without the writ. For all purposes of information to the court the sheriff's deed is a return. It is produced, read in court, and entered on the record. It recites the sale, the mode and time of it, the name of the purchaser, the price and the payment of the money.

Judgment reversed, and a new trial awarded.

Cited by Counsel, 2 M. 266; 8 W. 281; 11 S. 101.

Cited by the Court, 1 Par. 47; 1 J. 26.

Cited by Lower Court, 18 S. 11.

Commented on and followed in 2 Wright, 54; and the case approved, 3 S. 305.

Where the sheriff makes no return of the execution, making the deed may be considered as the same thing, since it fixes him with the price: *Hinds v. Scott*, 1 J. 19; *Gibson v. Winslow*, 2 Wr. 49.

The cases are numerous, and are to be found in any digest, that mere irregularities before the sale do not affect the title of a purchaser: *Bright. Dig., Executions XIII. b.*

[PHILADELPHIA, DECEMBER 29, 1828.]

Adams *against* The Pennsylvania Insurance Company.

The disappointment of a reasonable hope of obtaining a cargo for the owner of the vessel himself, at the port to which she is sailing, with specie on board to purchase a cargo, but where no cargo has been purchased, nor a positive contract made for the purchase of one, does not authorize a recovery on a valued policy on freight, where the ship is lost on the voyage to the port of destination.

It seems, that a gaming policy is not good in Pennsylvania.

THE plaintiff, Robert Adams, brought this action against the Insurance Company of Pennsylvania, on a policy of insurance dated September 2d, 1822, on the freight of the brig *Shamrock*, *valued at four thousand dollars, on a voyage at and [*98] from Gibraltar to Bordeaux, at and from thence back to Philadelphia, at a premium of two per cent.

The plaintiff was the owner of the *Shamrock*, which he sent to Gibraltar in the spring of 1822, with a cargo belonging to

[*Adams v. The Pennsylvania Insurance Company.*]

himself, to be sold at that place. The letter of instructions dated May 9th, 1822, to the master, R. Pickle, was to the following effect: "Whither your course may be directed from Gibraltar, will depend on advices from my friends Dowling & Sons of Bordeaux. I have directed them, if brandies are low, to purchase four hundred pipes for your return cargo. If high, you are to shape your course to St. Petersburg, and bring home hemp and iron. If you can get goods on freight, not to interfere with my goods, do so. If no advices are received from Dowling & Sons, I leave the course to you," &c. Many letters from the plaintiff to Dowling & Sons, and to the master, and some from Dowling & Sons to the master, were read in evidence. The plaintiff at first directed Dowling & Sons to purchase for him four hundred pipes of brandy, if they could be had for two hundred and fifty francs. In consequence, however, of the low price of brandies here, and the quantity in the market, he, in a letter to Captain Pickle, limited him to two hundred and forty francs, and stated that he would prefer having not more than one hundred pipes put on board on his own account, wishing the vessel to be loaded with brandy or other goods on freight. A letter to the same effect was written by the plaintiff to Dowling & Sons. Brandy fell at Bordeaux to two hundred and thirty francs. No cargo was ever purchased.

The Shamrock sailed from Gibraltar for Bordeaux on the 28th of June, without a cargo, but having on board twenty thousand dollars in specie, to purchase a cargo. On the 7th of July, she was lost near Aveiro in Portugal. One keg of specie, containing four thousand dollars, was lost, and the remainder saved. The voyage was broken up, and the plaintiff claimed for a total loss of the freight insured. The jury found a verdict in his favour, subject to the opinion of the court upon the whole evidence; if the opinion of the court should be with the plaintiff, judgment to be entered for the plaintiff; if with the defendants, judgment to be entered for the defendants.

J. R. Ingersoll, and *C. J. Ingersoll*, for the plaintiff.—This was nominally an insurance on freight. In reality it was not so, nor was such the understanding of the parties. The plaintiff was the owner of both vessel and cargo. Freight is a compensation paid by the owner of the goods to the owner of the vessel for their transportation. The term itself implies an absence of unity of person and ownership. Yet the convenience of commerce has introduced a practice, seemingly paradoxical, but which, when understood, is productive of advantages, both to the owner and underwriter: to the owner, security, indem-

[Adams v. The Pennsylvania Insurance Company.]

nity, and protection: to the insurer, an *additional subject of profitable speculation; another means of receiving a premium, and retaining it, if the adventure be prosperous, and of subdividing his average in case of loss. The owner who takes the merchandize of others, contracts to receive a compensation in freight. When he ships goods of his own, he must rely on their profits for his compensation. This is a clear, defined, and lawful interest, fairly to be calculated on, and therefore a fair subject of insurance. Such an interest is insured directly, under the name of profits, where goods are on board out of which profits may arise; or indirectly under the name of freight, which is resorted to where it is not certain whether goods will be on board or not, but where a reasonable expectation exists that such will be the case in any part of a continued voyage or series of voyages forming an entire transaction. If the voyage be interrupted by a peril insured against, the underwriter pays, though there has never been a bale of goods on board; and though if there has been, belonging to the ship owner, his goods would have paid no freight. The case before the court is of the latter description. The contract, its construction, and the judgment to be pronounced upon it, depend upon an artificial principle; not upon the ordinary rule of indemnity for loss of freight. A recovery is justified by the disappointment of a reasonable hope; by the failure of judicious calculations. If that hope be rendered abortive, and those calculations vain by any of the causes which the underwriter has pledged himself shall not occur, he is responsible. This reasonable hope may rest on the possession of goods, or a temporary letting of the vessel at a price to be paid in the event of carrying merchandize, or on such a train of events, anticipated in regular succession and already begun, as in the natural and ordinary course of things, will lead to the transportation of a cargo, and the advantages which are its necessary result. Such a reasonable expectation of obtaining a cargo existed in the present case, as to entitle the plaintiff to recover. By the letter of instructions, the proceedings of Captain Pickle were to depend on the advices he should receive from Dowling & Sons, relative to the price of brandy at Bordeaux, and if it continued at two hundred and fifty francs, four hundred pipes were directed to be purchased for a return cargo. The plaintiff's letter of the 24th of April, 1822, to Dowling & Sons, informs them that the Shamrock will reach Bordeaux in June or July, with from twenty to twenty-five thousand dollars in specie, and instructs them to purchase from two hundred and fifty to three hundred short pipes, even if the price should advance a little. In his letter of the 30th of the same month, the plaintiff writes to

[*Adams v. The Pennsylvania Insurance Company.*]

that house to lose no time in procuring for him four hundred pipes, unless they think brandy will be still lower. On the 6th of May, the plaintiff writes, that in full expectation of the receipt of the brandy, the *Shamrock* will sail on the 10th for Gibraltar, carrying enough to produce funds for the purchase of four hundred pipes of brandy; and in his letter of the 9th of [100] May, he expresses a hope that his correspondents have made the purchase. On the 23d of May, after the *Shamrock* had sailed, he writes again, treating his former communications as an order, and expresses a hope that they may not have executed his order before receiving this letter; adding that one hundred pipes will probably be enough. His letter of the 25th of May, directed to Captain Pickle at Gibraltar, directs him not to go to Bordeaux, unless the brandy is purchased, or can be laid in at two hundred and fifty francs. In his letter of the 31st of May, to the captain, he considers the voyage to Bordeaux at an end, under the belief that such will be the directions of Dowling & Sons. Yet, in a letter dated the 6th of June, he recurs to his first orders, and instructs Captain Pickle, if the Bordeaux house should invite him, to accept the invitation. On the same day he writes to that house that he does not imagine they have had it in their power to execute his last order with the *Shamrock*, or to direct that vessel to proceed to their port from Gibraltar, where she has gone for the purpose. They are again told that her destination is in their hands. The same idea is repeated in his letter of the 23d of June, in which it is added, the four hundred pipes ordered, cannot come amiss of doing well. On the 16th of August, Mr. Adams informs Messrs. Dowling & Sons of the sailing of the brig with funds, their kind and disposition, the small number of vessels in port, and the low price of brandy, which he thinks will insure a full cargo, or at least four hundred pipes at two hundred and thirty francs. These letters show the desire and expectation of a cargo, orders given to procure one, and the remittance of ample funds for that purpose. His insurance on the 2d of September, proves his firm belief that the brandy had been procured, and the light in which he regarded the order he had given. The letters of Messrs. Dowling & Sons, show the acceptance of these orders, and though some doubt at first hung upon the destination of the *Shamrock*, it was removed by her actually sailing for Bordeaux and not St. Petersburg. In their letter of the 12th of June, to Captain Pickle, they say they hope to see him in July, and expect to give him quick despatch; and in that of the 22d of June to the plaintiff, they advert to the sailing of the brig on the 10th of May for Gibraltar, with orders to proceed to Bordeaux with funds to purchase

[*Adams v. The Pennsylvania Insurance Company.*]

brandy, which they say has fallen to two hundred and thirty francs, and may be under, and they postpone operating under the hope of getting it lower. After this correspondence, Messrs. Dowling & Sons would have been liable for an omission to comply with the plaintiff's orders, in case the vessel had arrived. Her arrival, however, was prevented by her loss, intelligence of which, they inform Mr. Adams in their letter of the 31st of August, had reached them from Lloyd's coffee house; and they express their regret at the event, as, if she had arrived at Bordeaux in the common course of time, she would, in all probability, have been, ere that time, safe in Philadelphia, with a cargo *of brandy not costing more than two hundred [*101] and thirty francs, if so much. Upon this state of things, the plaintiff is entitled to recover, 1. Because an entire voyage was broken up, in a part of which, a contract existed for a cargo, on which an equivalent for freight would have been received. 2. Because, at the time of the loss, a cargo of specie was on board, which never reached the port of destination, and the equivalent for freight was lost. 1. That ideal, contingent results growing out of substantial possessions, are legitimate subjects of insurance, is well settled. *Barclay v. Cousins*, 2 East, 544. In *Grant v. Parkinson*, Park on Ins. 402; *Phillips on Ins.* 46, the plaintiff, who had a contract to supply the army with spruce beer, insured his profits on a cargo of molasses, and recovered. In *Eyre v. Glover*, 16 East, 218, the insurance was merely on "profits," without stating what they were to grow out of. *Fosdick v. Norwich Marine Insurance Company*, 3 Day, 108; *Abbott v. Sebor*, 3 Johns. Cas. 39; *Tom v. Smith*, 3 Caines' R. 245, are all to the point that profits may be insured. In these cases there was something actually at risk, out of which the insurable interest was to rise. But where the insurance is on freight, even that is not a prerequisite. Insurance was effected on the freight of a ship chartered to go to Teneriffe, and there take a cargo for the West Indies. She was lost on the voyage to Teneriffe, before the cargo was taken on board. The interest was held to have commenced, and the assured recovered. *Thompson v. Taylor*, 6 T. R. 478; *Condy's Marsh.* 279. In that case there was a charter party; but it makes no difference whether the agreement to supply a vessel with a cargo or to pay a freight, be under seal, or in writing without seal, or only verbal. *M'Kenzie v. Shedden*, 2 Campb. 431; *Patrick v. Eams*, 3 Campb. 441; *Moses v. Pratt*, 4 Campb. 297. In *Montgomery v. Egginton*, 3 T. R. 362, freight was insured, valued at fifteen hundred pounds. There were goods on board, the freight of which would have been only five hundred pounds. The vessel was lost; and it was held, that an insurable

[*Adams v. The Pennsylvania Insurance Company.*]

interest in the whole had accrued. There the whole cargo had been purchased. But in *Truscott v. Christie*, 2 Brod. & Bing. 320, freight and passage money were insured from India to Europe. Before the alterations necessary to receive the passengers were completed, the ship was lost, and the underwriters were held liable for the freight and passage money, merely on the ground of a contract having been entered into. And, in *Parke v. Hebson*, a case cited by Richardson, J., and not reported, where a seeking ship which was to go to several places, and no definite contract had been made for the whole amount of freight, was lost at Jamaica, with part of her cargo on board, the plaintiff recovered. The principle established by the cases cited and by those of *Hart v. The Delaware Ins. Co.*, *Condy's Marsh.* 281; *Davidson v. Willasey*, 1 Maule & Selw. 313; *Curling v. Long*, 1 Bos. & Pull. 636; *Davy v. Hallett*, *Condy's Marsh.* 178, and *Horncastle v. Stuart*, 8 East, 400, is [*102] *that wherever there is a well grounded expectation that freight will be realized, it may be insured. It is laid down generally in *Phillips on Ins.* 44, that a person having a contract which may afford an emolument, has an insurable interest as soon as he has incurred expense, or taken steps towards the execution of the contract. The plaintiff alleges that everything was done in this case necessary to give him an insurable interest. The negative propositions he has to combat are: 1. That there was nothing but a contingent contract. 2. That no purchase of a return cargo had been made. Every future event is contingent, and none more so than the result of a mercantile adventure. In the present instance there was nothing contingent which depended upon the will of the insurer. The contingencies depended upon events not under his control. The information of Dowling & Sons, was to direct the movements of the *Shamrock*. This direction was given, and thus, what was before uncertain, became fixed. The insurance was effected after the uncertainty had ceased. All was then resolved into the mere contingency of the arrival at Bordeaux, a contingency connected with every case in which a cargo is not actually on board. As to no purchase having been made, there are many cases in which the same feature existed. Where there is a charter party, the right to recover is not denied; and yet the only difference between a chartered ship and another is, that the expectation is stronger. No case can be found of a vessel sailing on a continued voyage with part of a cargo on board, and an agreement for a cargo in a latter stage of it, where a loss in the early part of the voyage has not been protected by the policy. The cases are either of a single voyage with a part only of the cargo on board, or a continued voyage with no cargo

[*Adams v. The Pennsylvania Insurance Company.*]

whatever on board or secured. If a cargo be secured, it is immaterial whether or not any was on board at the time of the loss. The loss of the ship is the total loss of the freight. *Marsh. on Ins.* 586; *Phil. on Ins.* 426; *The Louisa*, 1 *Dodson's Ady. Rep.* 319; *Hunter v. Prinsep*, 10 *East*, 378.

2. There was a cargo of twenty thousand dollars on board, which, though it did not fill the vessel, was sufficient to purchase a cargo to fill her. The China ships carry nothing but money. Freight on dollars is never on the bulk, but a percentage on the amount, no matter what space it occupies. If, instead of money, the brig had had on board goods, on the voyage to Bordeaux, the plaintiff would have been entitled to recover; and there is no difference, except that money pays freight per cent., and goods per ton. The freight lost upon this cargo of dollars from Gibraltar to Bordeaux, by the agreement of the parties, was four thousand dollars. There is no evidence it was less, and it was valued at that sum. The parties were the judges of the value of the subject of insurance, and they have themselves fixed the standard.

Binney and Chauncey for the defendants.—In this case two questions arise. 1. Whether the plaintiff is entitled to recover his insurance in consequence of the expected cargo at Bordeaux. 2. *Whether he can recover the four thousand [*103] dollars insured, by reason of the five kegs of specie on board on the voyage from Gibraltar to Bordeaux.

1. The law of insurance on profits may be, that the insured shall recover, if the goods are lost, though there would have been no profits had they arrived. This is certainly not the law of England. It may possibly be the law in New York, but it is not settled here. It may be, that a reasonable expectation of profits on a cargo already shipped on a voyage, is a good insurable interest; but a reasonable expectation of profits on a cargo expected to be shipped, never was, and never can be held to be an insurable interest. *Knox v. Woods*, 1 *Camp.* 543, is an answer to all such expectations of expectations. *Grant v. Parkinson*, *Barclay v. Cousin*, *Eyre v. Glover*, were all cases in which the insurance was on the profits of a cargo actually shipped. The insurance, in the present instance, was on a sober interest called freight, which must stand or fall by its own law, and that law is thoroughly settled. There is nothing fanciful about it. The only particular in which it appears to be so, is in regarding the owner of the ship and the owner of the goods as two persons, even where they are one, and allowing him to insure. Still, his interest is real. The policy may be valued or open, though it is usually a valued policy. If valued and a partial loss happen, it

[*Adams v. The Pennsylvania Insurance Company.*]

must be opened to ascertain the extent of the loss, which may be estimated after it has happened, as well as valued before. The current rate of freight, at a particular time, may be as easily ascertained as the current price of flour. A policy on profits is alone necessarily valued, and in practice always contains a special clause "free from average," &c. Phillips on Ins. 319; *Waln v. Thompson*, 9 Serg. & Rawle, 115. The question then is, whether the plaintiff had an insurable interest in the freight of the Bordeaux cargo. Insurance on freight covers nothing but the freight of goods on board, and freight contracted to be paid, and which, or its equivalent, would be payable, whether goods be shipped or not. If the perils insured against prevent the owner from earning freight, in either of these cases, the insurer is liable, but not otherwise. Such a foundation of freight as a reasonable expectation of the ship owner bringing a cargo for himself; or a contract for a cargo to be furnished for himself; or the existence of a cargo belonging to him, for which he is sailing, is without warrant of law. The contract meant, is a contract by a third person to ship on freight, not to supply a cargo for the owner of the vessel, to ship for himself. It is a fixed principle, that the assured must have an interest at the risk of the perils in the policy, and it must continue and be subsisting, at the time of the loss: Phillips on Ins. 26, 27. The freight of goods shipped is such an interest. There is an inchoate right to freight, and, if not prevented by peril, the owner must raise freight out of the interest insured. Where freight is contracted to be paid, and no goods are shipped, there is no inchoate right to freight, but a [*104] right to damages *for breach of contract. In reference to the latter description of claim, some judges, particularly Lord Ellenborough, have thought the cases have gone too far. The difference between a valued and open policy, is nothing as relates to the question, whether the insured had an insurable interest in the freight. A valuation is a mere estimate of the prime cost or amount of the thing insured to save the proof of actual cost or amount. It does not preclude the inquiry whether the thing was at risk at all, nor how much was at risk. In the case of *Tonge v. Watts*, 2 Stra. 1251, decided in 1747, by Chief Justice Lee, no goods were on board; no contract of affreightment was entered into, and no recovery was had. This case has never been questioned: 2 Wash. C. C. Rep. 350. It is the Magna Charter of the law, delivered by a great commercial lawyer. If a reasonable expectation was sufficient, there was in that case, much more; the very goods were ready. The goods were not only contracted for, but provided. The case of *Montgomery v. Eggington*, 3 D. & E. 362, decided by Lord Kenyon in 1789, in which the plaintiff recovered, is shortly and unsatis-

[*Adams v. The Pennsylvania Insurance Company.*]

factorily reported. Whether there was a contract of affreightment, does not appear, and the reasons of the court are not given. It is understood to have been a case of contract. If it was not, it is not law, for nothing is better settled, than that the valuation of an entire subject does not entitle the insured to a recovery for the whole, if part only is on board. *Thompson v. Taylor*, 6 D. & E. 478, in 1795, was the case of a charter party for a round voyage, and for an entire freight. The vessel was lost after she had sailed under the contract, and before she had taken her cargo on board. The plaintiff recovered, because the right under the contract had begun. This was the first case in which a charter party or contract of affreightment was allowed to stand in the place of actual shipment, and it has been thought to have gone to the very verge of the law of insurance. The right to freight for the use of the ship, was put on the same foot as the right to freight for the carriage of goods. *Atty v. Lindo*, 4 Bos. & Pull. 236, before Sir James Mansfield, was also the case of a charter party, not differing from the last, except that the goods were carried in part of the voyage, and part was delivered, but the contract gave no right to freight unless all was delivered; and, therefore, there was a total loss. *Horncastle v. Stuart*, 7 East, 400, decided by Lord Ellenborough in 1808, went upon the same principle. In *Forbes v. Cowie*, 1 Camp. 520, 522, in 1808, there was no charter party, and the liability was held to extend only to the goods on board. *M'Kenzie v. Shedden*, 2 Campb. 431, in 1810, was also the case of a charter party. In *Forbes v. Aspinall*, 13 East, 323, (181), Lord Ellenborough held that where there is no contract, the assured could only recover for the freight of the goods shipped, notwithstanding it was a valued policy; and that probability or reasonable expectation, furnished no ground for a recovery. Upon the same principles the case of *Patrick v. Eams*, 3 Camp. *441, was decided in 1813. In *Davidson v. Willasey*, 1 Maule & Selw. 313, the ves- [*105] sel sailed under a charter party from Liverpool to Jamaica, and then to London. The freight, valued at four thousand pounds, was insured. She arrived out and took in half a cargo, the remainder being ready. The vessel was stranded, and a total loss under the policy was incurred. *Truscott v. Christie*, 2 Brod. & Bing. 320, in 1820, is the last English case on the subject. There, a verbal agreement was made and expenses were incurred, but the vessel was disabled by a gale before sailing, and it was decided to be a total loss. Park, J., said he thought *Thompson v. Taylor*, the first case of contract, went too far. Here is an unbroken current of authorities in support of our position, which has never been shaken. The expression of Lord C. J. Eyre, relied upon on the opposite side, as to a well grounded expect-

[*Adams v. The Pennsylvania Insurance Company.*]

tation must have meant a well grounded expectation that freight would be raised upon goods on board. If he meant an expectation of goods not on board, he cites no authority for his position, and none can be cited. The American cases, *Livingston v. The Columbian Ins. Co.*, 3 Johns. 49; *Hart v. The Delaware Ins. Co.*, 2 Wash. C. C. Rep. 346; *Riley v. Hartford Ins. Co.*, 2 Conn. Rep. 368, are to the same effect. In this state of the law, the expected cargo at Bordeaux is out of the question. There was no contract of charter party or affreightment; no goods were on board; and a review of the correspondence will show, that no goods were ever contracted to be provided for the owner, nor was there any breach of orders in not providing them.

2. Can the plaintiff recover the four thousand dollars by reason of the five kegs of specie on board when the *Shamrock* sailed from Gibraltar? The voyage was one and indivisible. The valuation was upon an entire interest in the freight expected to be made during the whole voyage; and the insurance was upon an entire premium. The intention was to value the freight, which would be on board during the voyage from Bordeaux to Philadelphia, at four thousand dollars, and not the freight of the specie. It will hardly be pretended, that in point of value, the freight of five kegs from Gibraltar to Bordeaux, is equal to the freight of four hundred pipes from Bordeaux to Philadelphia. If the specie is to pay freight per cent. and not by bulk, it must fall infinitely short of four thousand dollars. The value of the dollars is not the question. They were insured and the loss paid. It is the value of the carriage of the dollars, which is to be regarded. If the plaintiff meant to value that at four thousand dollars, he did not say so, and if he has done it without the agreement of the defendants, it is a fraudulent valuation, and void. *Phill. on Ins.* 304, 306.

But there is another view to be taken of this case. If the plaintiff had an insurable interest, there has been no total loss of the freight; not even a technical total loss. If the ship is injured and unable to proceed, the owner is bound, if he can, to [*106] carry on the goods *by another ship and earn his freight. If he cannot, there may be either a partial or a total loss of the freight. There is no evidence to show that the plaintiff could not carry the dollars saved to Bordeaux, nor that he could not carry the brandy to Philadelphia, and it lies upon him to show that he could not. *Carter v. The American Ins. Co.*, 7 Cowen, 364; *Saltus v. The Ocean Ins. Co.*, 12 Johns. 107; *Bradhurst v. The Col. Ins. Co.*, 9 Johns. 17.

HUSTON, J. (after stating the case), delivered the opinion of the court as follows :

[*Adams v. The Pennsylvania Insurance Company.*]

It was admitted, that the owner of a vessel and cargo may insure on freight when carrying his own goods; but it is contended, that the policy never attached in this case. It was settled long ago, that although the goods are ready to be loaded, yet if none of them are actually on board, and the vessel is driven from her moorings and lost, there can be no recovery on an insurance on freight. 2 Stra. 1251. But it has also been settled, that if a vessel is chartered to go to T., and take in a load and carry it to B., and she is lost on her voyage to T., and never takes in any load, there can be a recovery on the policy on freight, on the ground it would seem, that the contract to sail to T., and take in the lading and carry it to B., was one entire contract, and having set sail, the policy attached. 6 D. & E. 478. This ship sailed under a charter party. It would seem to have been settled since, that if the vessel sails under a contract, or being in a port, an express contract is made to load her, and she is fitted to take in such load, and is lost, there can be a recovery on the policy on freight. Indeed, there seems to be no doubt that a recovery may be had on such policy, if the vessel is loaded, though she has not sailed; or, if she has an express contract for a load, though none of it is on board; or, if she has set sail for the place at which she is to load, or, if being at the place of loading, her owners have commenced fitting her, to receive and carry the loading contracted to be carried. The defendants say no case has gone beyond this, and the plaintiff insists, that if there is a reasonable expectation of a load at a port, and a vessel sails for that port to take it in, the policy attaches, and if the vessel is lost by the perils insured against, the sum insured will be recovered.

Most of the cases on this subject have been cited in the argument, and I have carefully examined them, and have come to the conclusion, that according to the decided cases, the defendants are not liable in this case.

It has been contended that the plaintiff can recover though there was no contract and no load, in other words, that a gaming policy is good in this state, as it is said to be in New York. The only decided cases are otherwise. Since those decisions, the law has been considered by both the insured and insurer, to be otherwise. Contracts are predicated on the law as established, that there must be something in which the insured has an interest, or the contract is void. It might *work great in- [*107] justice to decide on other principles, and I am not able to discern any good result to be expected from changing the law on this subject. The case in 13 East, *Forbes v. Aspinall*, was of a vessel loaded with goods, as was fully proved by the event, sufficient to purchase a return cargo, and there was no question

[Adams v. The Pennsylvania Insurance Company]

but they would be applied to purchase one, or that when purchased, it would be carried in that ship. There was an insurance on her freight; part of her outward cargo was sold; a part of her return cargo was loaded, and she was wrecked; and a recovery was had only for the freight of so much of the return cargo as was loaded; and yet there was reasonable ground to expect a full load. The phrase reasonable ground to expect a load, was used by an eminent judge, but not in a cause of insurance on freight; it was a mere *obiter dictum*. The last English case, 2 Brod. & Bing. 320, will not help the plaintiff, nor will Parke v. Hebson there cited. The note of this latter case is too short and too defective in precision to afford any certain light; the phrase "he produced letters from merchants and plantation owners respecting the intended shipments," is very vague, but we see that those letters must have been precise, and amounted to a contract; for Park, J., says in Parke v. Hebson, the contract was only deducible from letters; and Richardson, J., before whom it would seem that cause was tried, says, "the question is, whether there was a subsisting contract, under which the party could have recovered, but for its interruption by the perils of the sea." That there is no magic in a charter party is clear from the case of Parke v. Hebson. And the whole case goes on the ground, that if there is an express contract, though no charter party, nay, though only by parol, freight may be insured, but it gives no colour to the doctrine that anything less than loading the goods or an express contract, will have that effect.

The case in 2 Conn. Rep. 368, is full and express to the same point. It is almost this very case. It does not seem to me in principle to vary from or go beyond the law as settled before.

In this case, from the plaintiff's own letters the arrival of two or three ships at Bordeaux for brandy, before the Shamrock, might, and probably would have raised the price above the limit fixed by the plaintiff; nay, political news might have had that effect, and then the ship was to load on freight, if she could get it, or go to Russia. There was no cargo purchased for her; there was no contract on which any person was liable, if she was not loaded: it is not within any of the decisions or any settled principle of decision, and the judgment must be entered for the defendants.

Judgment for the defendants.

Cited by Counsel, 3 R. 223; 3 Wh. 476, 524; 31 S. 155; s. c. 3 W. N. C. 201.
Cited by Court, 13 W. N. C. 490.

See note to Phillips v. Ives, *ante*, p. 36.

*[PHILADELPHIA, JANUARY 10, 1829.]

[*108]

Collam *against* Hocker.

IN ERROR.

Parol evidence is not admissible to prove the reservation of a right of way, which is not reserved by or noticed in the deed.

WRIT of error to the District Court for the city and county of *Philadelphia*, in which a verdict and judgment were returned in favour of the plaintiff below.

It was an action on the case, to recover damages for a disturbance of a right of way. On the trial below it appeared, that John Hocker (the plaintiff below) and Christopher Hocker, were, on the 17th day of September, 1822, tenants in common of a messuage and lot of ground on Green Street. They also owned, in severalty, the two adjoining houses to the east, the middle house being Christopher's, and the easternmost John's. The ground on which these three messuages were erected, was sold to the Hockers by one West, who reserved a rent charge. By the terms of the contract with West, he was not to complete the sale by a deed of conveyance, until the Hockers had made sufficient erections to secure the rent charge. John and Christopher laid out the ground into three lots, and built these three houses at their joint expense, and the ground was so arranged, that there was a passage way, or alley, from the rear of the easternmost lot, across the rear of the middle lot, and through the eastern part of the westernmost lot, under an arch-way to Green Street. John and Christopher Hocker subsequently resolved upon a division in the above form, which was effected by receiving three separate deeds from West, apportioning the ground rent.

On the 17th of September, 1822, John and Christopher Hocker conveyed, by one deed, the middle and westernmost messuages to one Enoch Addis, in fee, and the said Enoch, on the fifth of July, 1823, conveyed the westernmost messuage to Collam, the defendant below, who, in the month following, closed up the alley at the point where it entered his lot. From the time of the erection of the buildings, to this period, the alley had been enjoyed by the tenants of the easternmost house, and was divided off from the lots through which it passed, by a substantial board fence.

In the deed from the Hockers to Addis, there was no reservation of a right of way for the benefit of the easternmost house; but, on the trial, the plaintiff below offered to prove that there

[*Collam v. Hocker.*]

was a parol reservation at the time this conveyance was made, and that the defendant bought with notice of such reservation. This evidence was objected to, but admitted by the court; whereupon, the plaintiff examined Christopher Hocker, and Enoch [*109] Addis, who deposed *that the said alley was distinctly reserved at the time of making the contract, and that it was their contract that it should remain in the state in which it then was, for the benefit of John Hocker's house. They also deposed that the scrivener who drew the deed, read it to them, and they all declared it was right. It was then proved that the defendant, Collam, had been often heard to declare that "he had never bought the alley, but that his deed gave it to him, and he had an undoubted right to take it in." At the request of the defendant's counsel, the court sealed a bill of exceptions.

The error assigned in this court, was the admission of parol testimony to prove the right of way, which was not reserved by, or noticed in the deed.

Rawle, for the plaintiff in error, contended, 1st, That there was no fraud or mistake, which distinguishes this case from *Hurst v. Kirkbride*, 1 Binn. 616; *Thomson v. White*, 1 Dall. 424; *Field v. Biddle*, 1 Yeates, 132; 2 Dall. 171; *Dinkle v. Marshall*, 3 Binn. 587, and all the other cases which establish and limit the admissibility of parol evidence to vary written instruments in Pennsylvania, and that it more resembled the cases of *Snyder v. Snyder*, 6 Binn. 483; *Pickering v. Stapler*, 5 Serg. & Rawle, 107; *Heagy v. Umberger*, 10 Serg. & Rawle, 341. 2dly, That the parol evidence admitted was not of what occurred at, but before the execution of the instrument, and that the deed must be considered a consummation of all previous bargaining, and the final intent of the parties: *Cozens v. Stevenson*, 5 Serg. & Rawle, 421.

3dly, The statute of frauds declares that all leases, estates, &c. (excepting leases for three years) made or created by parol, shall have the effect of leases or estates at will only. Here the plaintiff attempts to set up a right of way by parol, which, being a species of estate, is therefore, in contravention of the statute: *Jones v. Peterman*, 3 Serg. & Rawle, 543.

Haly and *F. W. Hubbell*, for the defendant in error, argued, 1st, That this parol testimony was admissible in Pennsylvania, on the authority of *Hurst v. Kirkbride*, cited in 1 Binn. 616; *Thompson's Less. v. White*, 1 Dall. 424; *Peterson v. Willing*, 3 Dall. 506; *Less. of Dinkle v. Marshall*, 3 Binn. 587; *Christ v. Diffenbach*, 1 Serg. and Rawle, 464; *Campell v. M'Clenachan*, 6 Ib. 171; *Hill v. Ely*, 5 Serg. & Rawle, 363; *Lyon et al. v.*

[Collam v. Hocker.]

Huntingdon Bank, 14 Ib. 285 ; Stubbs v. King, Ib. 206 ; Frederick v. Campbell, Ib. 293 ; Miller v. Henderson, 10 Ib. 290 ; Mackey v. Brownfield, 13 Ib. 239. They contended that the term, "fraud," in those cases, did not mean a tricking, over-reaching, or deceiving the party at the time of the contract, but the fraud of setting up a written agreement in contravention of the parol stipulation and expressed intent of the parties.

2dly, That this case is distinguished from Cozens v. Stevenson, 5 Serg. & Rawle, 421, thus ; that case was decided on the presumption that the last agreement was the consummation of the party's *intention. In the present case, such presumption is rebutted by the evidence of the grantee and one [*110] of the grantors, who deny that they waived the parol agreement by the deed, and also by the defendant's declarations. Such presumptions may be so rebutted : Stubbs v. King, 14 Serg. & Rawle, 206 ; M'Dowel v. Cooper, Ib. 297.

3dly, This case is easily distinguished from all the other cases in Pennsylvania, in which it has been decided, that parol evidence was not admissible, in this : that in none of those cases was there a parol contract. The parol evidence was either of declarations by one party, not communicated to the other, or, of parol declarations by one party, not assented to or acquiesced in by the other, and forming no part of the consideration of the deed ; and if there were no contract, there was no fraud in the sense that we have defined it, to wit ; a fraudulent setting up of a written instrument, in contravention of the parol agreement of the parties.

4thly. The statute of frauds has no sort of application to this case ; for the question here, is not what estate may pass or be raised by parol ; for the right of way is a part of the ancient dominion, but whether that has been given away. The plaintiff seeks not to raise any new estate, but to remain in *statu quo*.

The opinion of the court was delivered by

SMITH, J.—This case comes before the court, upon a writ of error to the District Court for the city and county of *Philadelphia*. It was an action of trespass on the case, brought by the defendant in error against the plaintiff below, for obstructing his right of way.

The plea was, not guilty.

The cause was tried on the 17th day of April, 1826. On the trial in the court below, the plaintiff, the now defendant in error, gave in evidence, that he and his brother, Christopher Hocker, were, on the 17th day of September, 1822, seised in their demesne, as of fee, of two brick houses and lots of ground, in Green Street, in the township of the Northern Liberties, in

[*Collam v. Hocker.*]

the county of Philadelphia, and being so thereof seised, by deed, dated the same day and year, conveyed the same to a certain Enoch Addis, in fee. The plaintiff below further proved, that, at the time of the said conveyance to Enoch Addis, he, the said John Hocker, was seised, in fee, of a certain other house and lot of ground, contiguous to the easternmost of the said houses, and, after having given this evidence, then offered to prove and give in evidence, "that a right for himself, his heirs and assigns, tenants and occupiers of the same house, to use an alley across the rear end of the lot on which the easternmost of the two houses is erected, and between the easternmost and westernmost of said houses, so, as aforesaid, granted to the said Enoch Addis, was verbally reserved for him, at the time of executing the said deed: That the said Enoch Addis verbally agreed to the said reservation, and that the defendant [*111] purchased of the said *Enoch, with notice of the said reservation." This being objected to by the defendant's counsel, the court overruled the objection, and admitted the evidence to be given, and sealed a bill of exceptions. This case then presents the following points:—Can parol testimony be admitted to show the reservation of a right of way, or of an alley, though not noticed or reserved in the deed? I would here observe, that it does not appear to me to be absolutely necessary for this court, in the present case, (nor is such my intention) to draw the exact line which should regulate the admission or exclusion of parol evidence in all future cases. If we were to do so, it might lead to great injury, and, in the language of a very learned and excellent judge, "I would not undertake to do this." If it be shown that the evidence received, was not, on legal principles, admissible, it will be sufficient for the decision of the present point. It has often been said, that courts should be very cautious in admitting any parol evidence to supply or explain written contracts, and that it ought not to be suffered, so as to contradict or explain away an explicit agreement. And, in *Meres v. Ansell et al.*, 3 Wils. Rep. 275, the court said, no parol evidence was admissible to substantially vary, alter, or impugn a written agreement; neither is it admissible to abate or extend a deed. In this state, I take it, the principle that parol evidence, which goes to destroy, contradict, extend, or alter a deed, is inadmissible, has been recognized, with some salutary exceptions and modifications;—for instance, where fraud or surprise in obtaining the deed, mistake of the scrivener in departing from his instructions, or any other clear matter of mistake are made to appear and present themselves to the court, parol evidence has been held to be admissible in this state. In the present case, the evidence given

[Collam v. Hocker.]

was not to prove any kind of fraud, or surprise, or any mistake of the scrivener in executing his instructions; nothing of the sort was pretended;—on the contrary, it appears that the lots of ground were fairly sold, and conveyed, absolutely, by deed, to Enoch Addis, in which no reservation of a right of way is made or mentioned; nor do we hear that anything of this alleged reservation of a right to use an alley across the rear end of the lots, was ever reduced to writing, or ever mentioned to the scrivener who drew the deed, or left out of it by any mistake; indeed, it is somewhat singular, that neither the scrivener nor the witnesses who were called; neither Christopher Hocker nor Enoch Addis, who made the bargain, state, or pretend to intimate, that it was left out of the deed by mistake, or that it had been agreed to be inserted in it:—to say the most of it, it was a mere parol reservation, left in parol, and depending on parol. Is then such a case within the rules or exceptions in which parol testimony has been admitted and received to vary a written deed? We think not. The right of way is an incorporeal right, which will not pass without deed;—it is the subject only of a grant to be passed by deed, and not by livery and seisin, and could not here be passed by a parol agreement, inconsistent *with the deed from Hocker to Addis; nor do [*112] I apprehend, that, under the existing circumstances of the present case, in relation to this claim of the right to the alley, chancery would or could compel a deed to be executed for it, by Addis or Collam. The parties mistook the law if they thought a right of way might be reserved by parol. The salutary rule of law, that where an agreement is reduced to writing, all previous treaties between the parties, are resolved into that, is strictly applicable here. The intention of the parties must be collected from their written expressions, and not from circumstances *dehors* their deeds. In this deed their expressions are intelligible, and need no foreign aid to explain them; and no ambiguity appears on the face of their deed. When then we have presented to us, a case in which parol testimony was offered and admitted to vary and contradict a deed, (not an agreement but an absolute deed, the completion of all bargains), and to establish a right of way by parol, we are of opinion the parol evidence ought not to have been received. And, therefore, the judgment of the District Court should be reversed, and a *venire facias de novo* awarded.

TON, J., dissented.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 1 Penn. R. 392; 3 Penn. R. 125; 4 R. 138; 2 Wh. 78 6 Wh. 91, 206; 1 W. 35; 3 W. 184; 8 W. 146; 8 W. & S. 324; 7 Barr, 118; 8 Barr, 386; 5 H. 224; 1 J. 279; 2 J. 96; 3 H. 70; 10 H. 242; 2 C. 442; 9 C. 377; 3 G. 55; 6 S. 313; 12 S. 455; 21 S. 67; 15 N. 213; 1 W. N. C. 369.

Cited by the Court, 1 Penn. R. 419; 2 Ash. 328; 4 W. 291; 3 Barr, 255.

[PHILADELPHIA, JANUARY 15, 1829.]

Thomas *against* Thomas, surviving Executor of Thomas.

Testator directed his real estate to be sold by his executors, and that when sold and the money collected, they should pay all his just debts and all the just debts of his son L., contracted up to the date of the will, but none that he might contract after that date. He then directed that his wife should have and enjoy all his estate, real and personal, during her life, and that at her death, one moiety should be left at her own disposal. The other moiety he directed to be put out at interest for the use and benefit of his son L., for him to receive the interest of the same annually during his natural life; and at his decease, the principal and interest of the same, to be at his own disposal. The wife survived the testator and died intestate. The son L. survived his father and mother, and died intestate, leaving the plaintiff his only child.

Held, that after the death of the widow, without appointment, one-half of the estate vested absolutely in the son L. as next of kin, and was liable to his debt; and that as to the other half, it went to his son L. for life, and after his death, without appointment, to the plaintiff as next of kin of the testator, and was not liable to the debts of the testator's son L.

ON the trial of this cause at *Nisi Prius*, a verdict was rendered for the plaintiff, for three hundred and eighty-nine dollars sixty-four cents, subject to the opinion of the court upon his right to recover, upon the whole evidence; from which it appeared that Nathan Thomas, the defendant's testator, departed [*113] this life having made his last *will and testament bearing date the 3d of November, 1804, wherein he devised as follows:—

First. “My will is, that the plantation and tract of land which I now possess in the township of Blockley, and county aforesaid, with the appurtenances thereunto belonging, be sold two years after my decease, or at any time within the said term, if my executors shall conceive it most advisable for the benefit of the same, and when sold and the money collected, my will is that all my just debts be paid, and also all the just debts of my son Lewis Thomas, which he may have contracted until the date of this my will, but none that he may contract after this date. My will further is, that my beloved wife, Sarah Thomas, shall have and enjoy all and singular my moneys, goods, chattels, rights, credits, effects, and all my estate, real, personal, and mixed, whatsoever and wheresoever, during her natural life, and at the decease of my said wife, the one moiety or half part of the said estate which may be left at her own disposal; and the other moiety or half part of the said estate, to be put out to interest for the use and benefit of my son Lewis, and for him to receive the interest of the same annually during his natural life,

[Thomas v. Thomas, surviving Executor of Thomas.]

and, at his decease, the principal and interest of the same to be at his own disposal. And, lastly, I do hereby nominate and appoint my beloved wife, Sarah Thomas, executrix, and my beloved friend, Thomas Thomas, to be my executor of this my last will and testament, hereby revoking," &c.

Sarah Thomas survived the testator, and died intestate. Lewis Thomas survived his father and mother and died intestate, leaving the plaintiff his only child.

The defendant, who was sued as surviving executor of Nathan Thomas, also administered to the estate of Lewis Thomas, on the 19th of September, 1827. This action was brought by the plaintiff to recover the balance of the estate of his grandfather, according to the account filed by the defendant, as executor of that estate.

The defendant contested the plaintiff's right to recover, in behalf of the creditors of Lewis Thomas.

Chew, for the plaintiff, cited *Flintham's Appeal*, 11 Serg. & Rawle, 16, and contended, that it was clear, upon the intention of the testator, that Lewis Thomas, as to the moiety bequeathed in trust for him, had an equitable estate for life, with a power to appoint the reversion, which went to the next of kin of the testator at the time of his death, excluding Lewis, in default of appointment.

Binney, for the defendant.—The plaintiff, to support his action, must claim as next of kin to his grandfather, Nathan Thomas. If his title is as next of kin to his father, he must bring suit against the defendant as administrator of his father, and the debts of the father must then be paid. It is to avoid this payment, that the suit is brought against the executor of the grandfather.

The testator's will gives the whole of his estate to his wife for life, with a power of disposing, at her death, of a moiety, which *power was never exercised. After her death, he directs the other moiety to be placed at interest for the [*114] use of his son Lewis, and leaves him the power of disposing, at his death, of both principal and interest. This power also was never exercised. It is, consequently, the case of a limitation of estate, real and personal to A. for life, with a power of appointment over a moiety in fee or absolutely, to take effect at the death of A. and after A.'s death, a further limitation of a moiety in trust for the use of B. for life, with a like power of appointment to B. over that moiety; both the devisees having failed to execute the power.

The mother having died in the life of the son, and the testator

[Thomas v. Thomas, surviving Executor of Thomas.]

having omitted to make any provision for her failure to appoint the moiety placed at her disposition,—it follows, that at the mother's death, at the latest, the title to the reversion of the one moiety became vested in some one; and no person could have any pretention to it at that time, but the testator's son Lewis Thomas, who was both then and at the testator's death, his heir, and only next of kin. As to that moiety consequently the plaintiff, the grandson, can have no title.

The same is true of the other moiety; for the principle on which Lewis Thomas took the first moiety rules the other; namely, that a power of appointment or disposition, does not prevent the undisposed of estate from vesting somewhere in the meantime; that it vests in like manner as if the power was not created, either in the devisee over, or, if there be none, in the heir or executor, as trustee for the next of kin at the testator's death; and, consequently, that as Lewis Thomas, at the death of the testator, his father became entitled as heir or next of kin, to the reversion of one moiety of the estate after his mother's death, subject to her power of appointment, so he became entitled at the same time, to the reversion of the other moiety after the expiration of his equitable estate for life, subject to his own power of appointment.

This is a consequence of the nature of a power of appointment. Sugden on Powers, 148; Cunningham v. Moody, 1 Vez. 174; Doe v. Martin, 4 D. & E. 39. The estates limited over in default of appointment, are vested, as well in the case of personalty as of realty. Sugden on Powers, 151; Coleman v. Seymour, 1 Ves. 209; Gorden v. Levi, Amb. 364; Reade v. Reade, 5 Ves. jr. 748.

The son, Lewis Thomas, consequently, had the reversion of the moiety in himself, by his title as next of kin to the father, the testator having made no disposition of it; and, on his death, without disposing of it, his administrator took it upon the usual trusts of that office.

The objections to this argument are to be noticed.

1. It may be said that the testator's intention was that the son should have no more than what he expressly gave him,—an estate for life in a moiety. The answer is, that the testator [*115] has not given *the rest, residue, or remainder, to any one, and consequently, the law casts it on the son, either as heir or next of kin. If he meant to make a different disposition of it, *quod voluit non dixit*. The court cannot make a will for him. The son takes his own equitable estate for life, by express devise; the undevise residue, by his relation to the testator. If the testator did not mean he should have it, he has not shown who else should have it, and that is enough to cast it

[Thomas v. Thomas, surviving Executor of Thomas.]

on the son. If he had expressly said that his son should not have it, still the law would have cast the realty on him, as heir, and if he could not have made title to the personalty as next of kin, the executor would have kept it for his own use.

2. It may also be said, that this interpretation exposes the estate to the payment of the debts of Lewis, contrary to the express declaration of the testator. To this it is answered, that there is no such declaration in the will, as that Lewis's debts should not be paid out of Lewis's estate; but only that the testator's estate should not pay any of Lewis's debts after the date of the will. The testator meant to secure all to the wife for life, after paying certain debts; after her death, the interest of the moiety devised to the use of Lewis for life, was liable for all his debts, there being no provision to the contrary in the will, and clearly he was invested with power to devise it for their payment. Another is, that if the testator did not intend it should be liable for the debts, he has made no provision to exempt it, and the law can make none. If a testator does not dispose of his entire estate, the law, to prevent confusion, must do it for him. His purpose may be disappointed by this; but then it is because he has not had a complete purpose, or he has not stated what it is. The estate for life of the son was, however, as safe under one interpretation as the other. His taking the reversion did not expose the life estate to the creditors, since there was no merger or extinguishment of it.

3. It may also be said, that the estate vests, notwithstanding the appointment, only where it is the case of a limitation over in default of appointment, and not in a case where there is no limitation over. This distinction is not admitted. *First*, in the case of real estate. If an estate be devised to A. for life with a power to dispose of the fee, it is clear that the reversion descends to the heir at law, and is vested in him, subject to the operation of the power. It is his seisin alone that can serve the uses of the power. It is as effectually vested in him by operation of law, as if it were devised to him in default of the execution of the power. This is the consequence of the well established principles,—that what the testator does not devise away, descends to his heir;—that the courts always lean in favour of vesting,—and that if the reversion were in abeyance or contingent, the devisee for life might destroy it without having recourse to the power.

Secondly. In regard to personalty. The property in controversy is what belonged to the testator, and what he did not dispose of by his will. To whom does such property go, [*116] but to the executor in trust for the next of kin, at the testator's death, subject to be divested by the operation of the

[Thomas v. Thomas, surviving Executor of Thomas.]

power? That which the testator has not given away, cannot be contingent, for the law makes no contingent dispositions. All reversions are vested interests. There is always a person to take what a testator or intestate may die possessed of, and which is not disposed of by him. The objects of his gift may be contingent, or he may give contingently; but if he does not give the whole of his estate away, the part not given, whether it be part of a specific sum, or part of the entire fee simple or property in an item, necessarily vests somewhere. The whole difficulty of the question whether the limitation be vested or contingent, is confined to the case of a devise over, after the limitation of a preceding power to dispose of the entire estate;—it never existed in the case of a descent or intestacy where the law provides instantly an heir or successor, whose estate continues until displaced by the execution of the power. The very ground on which estates limited in default of a power, are held to be vested and not contingent, is, that until the power is executed, there is no estate created by it; and if this is the rule in regard to estates devised, it must be as to estates descended; for in the latter case, if the contingency exist at all, it must spring from the power, which, for the reason above stated, it cannot do, or it must be in the estate descended, which is a solecism. It follows, consequently, that after the death of the testator's widow, Lewis Thomas had an absolute estate in one moiety, a trust for life in the other moiety, and the reversion absolutely, subject to a power of appointment in himself, in which there is no repugnancy; for it is settled that a power to appoint uses may be reserved to the owner of the fee. The reversion of the estate vested in him, as so much of the use of the estate not declared by the testator, and therefore descending to his heir, or going *quasi ab intestato*, to his next of kin, to yield, nevertheless, to the estate that was to arise out of the execution of the power, if the son should exercise it, which he never did.

If the court assist the will by interpreting it to be a devise to the wife for life, with power to appoint a moiety, and if she fails, then as to that moiety, to the testator's next of kin, and as to the other moiety to the use of the son for life, with power to appoint it, and if he does not, then to the testator's next of kin, the result will be the same; for the legal sense of the words *next of kin*, is next of kin at the testator's death. 1 Rob. 150. *Holloway v. Holloway*, 5 Ves. jr. 399.

Upon either view, the plaintiff's title must be as next of kin to his father; and, consequently, he cannot maintain a suit against his grandfather's executor.

Ingraham, in reply.—It cannot be doubted, but that a tes-

[Thomas v. Thomas, surviving Executor of Thomas.]

tator may, if he thinks proper, limit an interest to such person as shall, at a particular time named by him, sustain a particular character. *His intention is the guide of the courts where the proper construction of his will becomes the subject of [*117] discussion; and that the claimant sustains the character of the particular legatee, or object of the testator's bounty, may be ascertained by inference, it never having as yet been contended that a legatee, to take under a bequest, must be absolutely named in the will. *Bartlett v. King*, 12 Mass. Rep. 537. The difficulty, in the present case, has been created by a state of things never contemplated by the testator, who supposed that both powers would be exercised; but still, if his intention be clear, and not repugnant to any known rule of law, the courts will give it effect, and their leaning is so to do, rather than disappoint it by any refined construction.

The question, then, upon this bequest, is in relation to the moiety bequeathed in trust for Lewis Thomas, during life, and over which, by will, he had a power of appointment. Who are we to suppose the testator intended the reversion to go to in the event of the non-execution of Lewis's power? To say to his next of kin, including Lewis, is begging the question; and would be in direct opposition to the leading provision of his will, by which he charged his estate with all his own debts, and those which Lewis "might have contracted until the date of his will, but none that he might contract after that date." The proper construction, therefore, is, that this was a bequest to the executor of Nathan Thomas, of a moiety of the fund in trust for Lewis, for life only, and upon his death without exercising his power of appointment, in trust for the person who should, at that time, be the next of kin of the testator, which description the plaintiff answers.

It is to be kept in mind, that this is a very inartificially drawn will, and that to construe it by any over refined rule, is to destroy the intention, which is abundantly clear; and hence the answer to the suggestion, that the testator has not said, that Lewis's estate should not pay Lewis's debts. The testator never supposed for a moment, that he had given Lewis any power over the estate, which might subject it to debts contracted after the date of his will; and though Lewis certainly might have appointed the moiety at his death for the payment of his debts, his father never contemplated such an exercise of the power he had given him to appoint the reversion of a fund, the life interest in which he had so carefully settled.

There is no case precisely like this; and the cases of limitations over of real estate, depend upon principles which produce confusion when applied to the construction of bequests of per-

[*Thomas v. Thomas*, surviving Executor of *Thomas*.]

sonalty. The argument by which those cases are called in aid of the defendant's construction of this will is, that there has been no disposition by the testator of his whole interest, and that even in the case of a personal estate, there must always be some one to take what is not disposed of. This is not denied as a general principle; but the answer to it is, that the testator did dispose of the reversion in the event of the non-execution of [*118] the power given to Lewis, if the *construction contended for on the part of the plaintiff be the correct one, and there was no intestacy at all. The power to appoint the reversion would have been useless if the defendant's construction be correct; for he had complete power over it upon its vesting in him, in consequence of the supposed intestacy of Nathan Thomas; and the very existence of this power in the will, is directly repugnant to the idea of his intending to die intestate, as to the reversion, and to the construction that he has not disposed of it; nor is it very easy to understand how the doctrine, that a power to appoint uses may be reserved to the owner of the fee, supposing it to be well established doctrine, which is not conceded, can be applied to a case of personal estate. There are many modifications of the interest which a man has in land, which cannot take effect in the case of personal chattels; for example, an estate tail.

The case most resembling this in principle, and decided upon the intention, is a very recent one, and is to be found in an elementary writer, (*Roper, Legacies*, 3 Lond. Ed.) It is the case of *Bird v. Wood*, 2 Sim. & Stu. 400. The bequest was of certain funds to trustees in trust, to pay the interest to the testatrix's daughter for her separate use for life; and after her decease, to the daughter's appointment by deed or will; and, in default of appointment, for the testator's next of kin, to be considered as a vested interest from the testatrix's death, except as to any child that might be afterwards born of her daughter. The daughter died without any child, and without executing any appointment. Her husband took out letters of administration to her, and claimed the fund; but Sir John Leach, Vice-Chancellor, held, that the persons, who at the testatrix's death, would have been her next of kin, if her daughter had then been dead without children, were clearly intended; that the daughter could not be such next of kin, for the persons intended were to take at her death; and must have been living at the death of the testatrix; for their interests were then to be vested. The case of *Holloway v. Holloway*, was cited for the husband; but the answer there was, as here, that it was clear that the testatrix did not mean to die intestate as to anything, and that the will authorized the exclusion of the daughter, be-

[Thomas v. Thomas, surviving Executor of Thomas.]

cause, without excluding her, it was impossible to make sense of it.

The opinion of the court was delivered by

HUSTON, J.—It has been contended that the power of appointment does not prevent the estate or money from vesting in default of appointment. This, however, is where by the will, the estate is limited expressly in case no appointment is made. Sugden on Powers, 148, 151. On recurring to the authorities cited, it will be found, that the case in 1 Vez. 209, was a devise to the testator's daughter of three thousand pounds, for the use of her younger children, to be by her distributed among them, in such a manner and shares as she shall think fit, and it was held to vest in the children. It is the *same as if the [*119] deviser had given it to her younger children equally, unless she directed otherwise; and the chancellor expressly says, "It might have been different had he given it to his daughter for life, and afterwards to her younger children, because, then it would be contingent and a devise over."

The case in 2 Ves. 209, is the same; a devise to younger children in such shares as their father should appoint.

The case in Ambler, 562, is of the same kind, and nearly in the same words, and it was held to vest in the children, and the case concludes, the distinction is between the case where a sum of money is provided for portions of children, and the father and mother have only the power to fix the time of payment, and *quantum* for each child; and where no sum is secured but in case of the appointment.

This case differs from all of them, but comes nearer that supposed in the concluding words. Here there is no person named or designated to whom the appointment is to be made. The testator stops at the death of Lewis; beyond that he does not direct it.

The distinction seems to be, and the point contended for by Sugden is, that if the testator after the life estate to Lewis, had given the property, if not disposed of by Lewis, over to a third person, it would have vested in that person, subject to be divested by an appointment by Lewis; but that is not this case.

Certain actions for real estate, in England, require a person seised of the freehold to be always in existence, on whom the process may be served, and the doctrine that the fee cannot be in abeyance, has been a means to prevent perpetuities; but every form of action relating to personal estate, may be brought against the person in possession of it; and besides, it vests, on the death of the testator, in the executor for the purpose of paying debts and legacies, whether directed to do so by the will or

[*Thomas v. Thomas*, surviving Executor of *Thomas*.]

not. It does not pass out of the executor without his assent, even to a legatee, and when directed to pass to a legatee for a limited time or for a special purpose, the absolute interest may still continue in the executor, if necessary to fulfil the intention of the testator, or to enable him to do his duty as executor; for example, suppose immediately before or at the death of Lewis, in this case, a debt of the testator, not barred by limitation, had been made known to the executor, or recovered against him by suit at law; this money could have been legally applied to the payment of such debt.

This matter lately came before this court, in a case much discussed, in which the judges, though not unanimous in other points, agreed on the construction of a devise such as this. I consider the point settled by that case; and, if not, I would consider the intention of the testator to be so plainly expressed in this, as to govern the construction, unless it would contradict some long established rule of law, for most clearly the testator devised his property in this will, expressly for the purpose of [*120] preventing his son *from squandering it. It is, none of it, given over to strangers, nor intended to go to strangers. The widow and mother of Lewis, is to have all during her life, with power of disposition; evidently, that if Lewis did not become more prudent, she might, by will, secure it against his imprudence; if she did not, the father provides for half of it; *Flintham's Appeal*, 11 Serg. & Rawle, 16, settles, that the widow and Lewis, each took an estate for life; but for that, I should have doubted whether Lewis, at least, did not take absolutely.

As to the part devised to the widow, he gives all to her during her natural life, and at her death one-half to be at her disposal. She did not dispose of it. It was then personal estate of the testator, remaining after payment of debts undisposed of, and went to Lewis as next of kin. This part vested in him absolutely, and is liable for his debts.

The other half remaining at the widow's death was to be put at interest for the use and benefit of his son Lewis, and he to receive the interest annually during his life, and at her decease the principal and interest to be at his disposal. This has, as I said, been held a life estate. Real estate given to a man for life, does not descend to his heirs, nor does personal estate given for life, go to his executors or next of kin. Lewis had the use during his life, with the power of disposing of it at his death. If it went to his next of kin, he would have been absolute owner, and not for life. Lewis did not dispose of it.

This half, then, was in the hands and possession of the defendant as executor of the testator, and, being undisposed of by

[*Thomas v. Thomas*, surviving Executor of *Thomas*.]

the will, goes to the next of kin of the testator. The plaintiff is next of kin to the testator, and entitled to this half. The administrator of Lewis is entitled to the first half which fell to Lewis absolutely at the death of his mother. If Lewis left debts unpaid, they must be discharged; and, if any surplus remain, that will go to the plaintiff as next of kin to Lewis, but will be demandable from the defendant, in his capacity of administrator of Lewis.

GIBSON, C. J.—It seems to me, the plaintiff can take nothing as next of kin to the testator; nor claim paramount to his father, unless by implication under the will. It is difficult to comprehend how the vesting of an interest undisposed of by the will, shall await the happening of a contingency; or how, where there is an express bequest for life coupled with a power of appointment, the testator shall be said to die intestate, or otherwise, as to the residue, just as the person to appoint may afterwards happen to execute the power. A power to appoint, is not an interest in the thing bequeathed; otherwise a power to dispose of the absolute property, would always be a bequest of the absolute property, which it clearly is not; and, it seems to me, that whatever is not disposed of by the will, sinks into the residuum, and vests in the next of kin necessarily at the death of the testator, subject, however, to be divested by an [*121] *exercise of the power of appointment. But, although the plaintiff, as it seems to me, cannot take as next of kin, a doubt occurred during the argument, whether to effect the manifest intention that the property should be exempt from the legatee's debts, and to prevent the will from failing of effect altogether, we ought not to imply a bequest over, in the event of a failure to appoint. And, undoubtedly, we ought, if there were anything to designate the person to take. But there is nothing to designate the plaintiff, except that he is the next of kin to the immediate object of the testator's bounty; a circumstance much too slight to found an implication. Where a testator omits to provide for an event, which he probably would have done had the particular instance occurred to him, a court of justice cannot repair the defect by inserting the necessary clause. The authorities for this are collected in *Roper on Legacies*, Ch. vi. Sect. 7, where they may be consulted. Here the plaintiff would probably have been provided for, had the contingency which has since happened, been foreseen. But this is by no means certain. He evidently was not intended to take in every event; else there would have been a positive limitation over, instead of subjecting the legacy to his father's power. It seems, then, that as nothing was bequeathed to the father but what vested in him by op-

[Thomas v. Thomas, surviving Executor of Thomas.]

eration of law, an interest for life, superadded to the absolute property, being a legal absurdity, the entire bequest fails of effect; so that the property in dispute having vested absolutely in the father, is subject to his debts in a course of administration.

ROGERS, J., concurred with GIBSON, C. J.

Judgment for the plaintiff.

Cited by Counsel, 1 M. 249; 4 R. 444; 2 S. 221.

[PHILADELPHIA, JANUARY 12, 1829.]

Floyd *against* Browne, Administrator of Truxton.

IN ERROR.

By recovering a judgment in trespass for carrying away the plaintiff's goods, his property in the goods is divested. Consequently, such a judgment is a bar to an action of *indebitatus assumpsit*, against any one, for the proceeds of the sale of the goods which were the subject of the trespass.

FROM the record of this case, returned on a writ of error to the District Court for the city and county of *Philadelphia*, it appeared, that in the court below, it was an action of *assumpsit* for money had and received, brought by the plaintiff in error, John Floyd, against the defendant in error, Aquilla A. Browne, administrator *de bonis non cum testamento annexo* of Thomas [*122] Truxton, deceased, who, in *his lifetime was High Sheriff of the city and county of Philadelphia.

The following were the circumstances upon which the plaintiff's claim was founded: To March Term, 1819, of the District Court, Caleb Cridland issued a *fiery facias* against a certain George Green. The sheriff levied upon goods belonging to the plaintiff, (Floyd), and sold them for the gross sum of twelve hundred and thirty-five dollars and ninety-four cents. In making the levy, Benjamin Cridland, Robert Black, Peter Care, Jr., Stephen E. Fotterall and George F. Alberti, assisted the said Caleb Cridland. Floyd brought an action of trespass *vi et armis*, against Benjamin Cridland, and the others who assisted him in the levy, and obtained a verdict and judgment for two thousand dollars against Caleb and Benjamin Cridland, and signed judgment by default against Robert Black, Peter Care, Jr., Stephen E. Fotterall and George F. Alberti, the other defendants. Execution was issued against all these defendants, and the money made out of the goods and chattels of Fotterall. Fotterall removed the record by writ of error to the Supreme Court, where, on the 2d of April, 1821, the judgment was re-

[Floyd v. Browne, Administrator of Truxton.]

versed as to all the defendants except Caleb and Benjamin Cridland, and the execution as to all. (See 6 Serg. & Rawle, 412). On the 19th of May, 1821, Floyd brought this action against the sheriff, to recover the proceeds of the sale of his goods wrongfully taken in execution. The defendant pleaded *non assumpsit* and payment, and a special plea of former recovery, which set forth the proceedings in the District Court and Supreme Court, above stated, in the suit brought by Floyd against Caleb Cridland and others. To this plea the plaintiff demurred, and the court below gave judgment for the defendant on the demurrer. The plaintiff thereupon took out a writ of error.

J. R. Ingersoll and *P. A. Browne*, for the plaintiff in error. —The question is, whether a plaintiff who has brought an action of trespass against certain individuals, for taking away his goods, and who has obtained judgment against them, but no satisfaction, can in an action for money had and received, recover from the sheriff, the proceeds of the sale of those very goods which have been tortiously taken from him? A man does not make the goods of another his own by wrongfully taking them, nor does a man lose his title to property, by being illegally dispossessed of it. The commission of a trespass does not change the property. The owner may, indeed, waive the tort, and proceed as if it were a contract. Hence, in trover, in which a fair finding is alleged, and not a tortious taking, a recovery of judgment vests the ownership of the goods in the defendant, and substitutes for them damages which are measured by their value. Bull. N. P. 32. But a judgment in trespass or larceny leaves the property unchanged, and it may be pursued into the hands of any one to whom it can be traced. There are cases in which a failure to prove property in one form of action is a bar to setting the same property in *another form. But there [*123] is no case to show that succeeding in the proof of property in one form, must induce a failure in a similar attempt in another form. In *Kitchen et al. v. Campbell*, 3 Wils. 304; 2 W. Black. R. 779, s. c., judgment was given for the defendant, because in a previous action of trover for the same goods, the plaintiff had failed. If replevin and trespass, which are both actions of tort, are brought together, the rule is, not that a recovery in one, will bar a recovery in the other, but that the pendency of one will prevent the further prosecution of the other.

Though in some cases a recovery in trespass is a bar to another recovery for the same trespass, yet there is no case in which a recovery in trespass is a bar to an action of *assumpsit*. It is an important feature of this case, that the sheriff was no party to the trespass. The plea does not allege that he was, and the fact

[Floyd v. Browne, Administrator of Truxton.]

was otherwise. He neither was, nor could be a party to the action, which was trespass *quare clausum fregit*. The sheriff never entered the plaintiff's close. He found the goods elsewhere, and sold them as he found them. All that the plea alleges is, that the judgment so recovered formerly, was for the same cause of action as that in which the defendant is now impleaded. This is true, so far as the identity of the goods goes, and so far as the defendant may have been an accessory after the fact to the trespass. Beyond these points they cannot be identified. It is precisely as if the plaintiff had traced his goods into the hands of a bailee or a stranger, or rather as if he had traced his money into the hands of a stranger, and then demanded it.

Two positions may be maintained: 1. There is nothing in this case to prevent a recovery from a joint trespasser, even in trespass. 2. *Multo fortiori*, there is nothing to prevent a recovery in *assumpsit*.

1. To bar a second action of trespass for the same joint act, there must have been either very satisfaction, accepted as such, or at least a valid execution, which, if not actually available, must have had its course without let or impediment from the law, the court or the party defendant. This principle is deducible from the earliest authorities, as well as from those of modern date. 14 Vin. Ab. 612; Judgment (T.) pl. 2; Id. 607; Judgment (P.) pl. 1, 2; 20 Vin. Ab. 540; Trespass (R.) 11; Broome v. Wooton, Yelv. 67; Cro. Jac. 73, s. c.; Coke v. Jenner, Hob. 66; Cro. Ch. 75; Claxton v. Smith, 3 Mod. 86; 2 Show. 484; Bull. N. C. P. 49; Sparry's Case, 5 Co. 61; Ferrer's Case, 6 Co. 7; Cro. El. 667; Felter v. Beale, 1 Salk. 11; Fields v. Law, 2 Root, 320; Livingston v. Bishop, 1 Johns. R. 290; Knox v. Work, 1 Browne, 101.

If the plaintiff may proceed against several trespassers until he has received satisfaction, it is difficult to imagine any principle which could stand in the way of a proceeding against a stranger who has received his money arising out of the very [*124] goods which were the *subject of the trespass, and who, therefore, does not even stand in the situation of a co-trespasser. That an execution issued in this case, amounts to nothing. It was reversed and made void, *ab initio*. Cridland v. Floyd, 6 Serg. & Rawle, 412. It could not be construed into an election; and if it could when it first issued, yet having been avoided, it was unavailing, and, consequently, no election either in fact or law. Parsons v. Lloyd, 3 Wils. 345; Read v. Markle, 3 Johns. 523; Patterson v. Swan, 9 Serg. & Rawle, 16.

J. Randall, for the defendant in error.—The defendant has long since paid away the money to the plaintiff in the execution

[Floyd v. Browne, Administrator of Truxton.]

under which it was raised, and an experiment is now made by a third person to recover that amount in an action of *indebitatus assumpsit*. No such action was ever brought before in any court. That the recovery of a judgment in trespass is a bar to any subsequent action, even without execution, is fully established. *Broome v. Wooton*, Cro. Jac. 73; *Yelv.* 67; *Bull. N. P.* 20; *Rawlinson v. Oriett*, Carth. 96; *Sparry's Case*, 5 Co. 61; *Ferrer's Case*, 6 Co. 7. This rule is fully adopted in Virginia. *Ammonett v. Harris*, 1 Hen. & Munf. 488, 498. And in Kentucky, *Ewing v. Foul*, 1 Marsh. 457. The case of *Livingston v. Bishop*, 1 Johns. R. 290, stands alone against all these authorities. In reference to that case it is worthy of remark, that it did not come before the court in such a way as to give rise to the question; added to which, *Livingston, J.*, and *Spencer, J.*, did not concur with the majority of the court. In the elementary treatises too, the principle is laid down, that a judgment in trespass, is a bar to another action for the same trespass. 1 *Chitty on Pl.* 76; *Esp. on Evidence*, 192. So far is it from being necessary even to issue execution, that in the books of precedent, the form of the plea is that the judgment remains unsatisfied. 2 *Chitty on Pl.* 437, 438; 3 *Wentw.* 143; *Story Pl.* 132. And 1 *Saund.* 67, there is a precedent, in which there is an averment of satisfaction on a recovery in foreign attachment; but the other precedents contain no such averment. The action of trespass is a joint remedy, and must be pursued jointly, which distinguishes it from the case of several actions on a promissory note, in relation to which the rights and the remedies are distinct. A release to one joint trespasser is a release to all; not on the ground of satisfaction, but of the extinguishment of the cause of action; 1 *Hen. & Munf.* 489. And a judgment is a higher satisfaction than a release; *Putt v. Royston*, 2 *Show.* 223 (211). A recovery in trespass of the value of the goods vests the title to them in the defendant in the action of trespass. The plaintiff's title is extinguished by the judgment. That such is the law in trover is familiar to every one; *Adams v. Broughton*, 2 *Str.* 1078; *Andrews*, 19. Indeed this is not denied; but it is said there is no case in which it has been decided, that a judgment in trespass vests the title in the defendant; *Rice v. King*, 7 *Johns.* 20, is to the very point. It was there held, that a recovery in trespass was a bar to an *action of assumpsit [*125] for the same cause. So a recovery in trespass, is a bar to a subsequent action of trover; 1 *Nott. & M'Cord*, 1. It is in fact a general rule, that wherever there is a recovery against a trespasser, the property which was the subject of the trespass vests in the trespasser, and no action in any form can be maintained for it; *Curtis v. Groat*, 6 *Johns.* 168; 1 *Hen. & Munf.*

[Floyd v. Browne, Administrator of Truxton.]

449 ; 13 Serg. & Rawle, 247 ; 12 Mod. 324 ; 1 Chitt. Pl. (Old Edit.) 89, 90 ; Pollex, 641.

It is not necessary to advert to the effect of the execution upon the opposite doctrine. The moment it was issued, the plaintiff had determined his election.

If the plaintiff in this case should recover, the sheriff will be without remedy ; for the bond of indemnity he received, will not cover the case ; while Floyd, who is still the owner of the judgment against the Cridlands, may recover the whole amount of it from them, which a recovery in this case could not prevent.

The opinion of the court was delivered by

GIBSON, C. J.—A plaintiff is not compelled to elect between actions that are consistent with each other. Separate actions against a number who are severally liable for the same thing, or against the same defendant on distinct securities for the same debt or duty, are consistent, being concurrent remedies. Trespass is, in its nature, joint and several ; and in separate actions against joint trespassers, being consistent with each other, nothing but actual satisfaction by one will discharge the rest. So far the law is clear. Here, then, the plaintiff had impleaded six jointly, and obtained judgment, but without actual satisfaction, against two ; and he now brings *indebitatus assumpsit* against a seventh for the price obtained for the goods which were the subject of the trespass. The point of defence mainly relied on, is that the plaintiff's property in the goods, was divested by the former recovery ; and consequently, that he cannot maintain an action founded exclusively on property in the goods, or the price of them. It is not easy to see how this is to be answered. It will not do to say that the present, though differing in form, is in substance an action to recover satisfaction for a trespass, and consequently, that the form is immaterial. There is, in fact, a substantial difference. The cause of action in trespass and in *assumpsit*, is as distinct in substance, as the actions are different in form. Trespass lies only for an injury to the possession ; and damages are recoverable for the taking, which is the gist of the action, separately from the value of the goods, the asportation being a circumstance merely of aggravation. *Assumpsit* lies for money received as the price of the goods, to the plaintiff's use, the detention of which, is the gist of the action, the trespass being waived, and not entering at all into the estimate of the damages ; it being well settled, that nothing is recoverable beyond what was actually received. If there were no difference as to substance, and [126] the form of the remedy were immaterial, a plaintiff might have several actions of *assumpsit* against those

[Floyd v. Browne, Administrator of Truxton.]

who had jointly sold his goods, on the ground of their having been obtained by a trespass, although the promise which the law implies from a joint receipt of the price, is also joint. He certainly might just as well proceed severally in *assumpsit* against all, as in trespass against some, and in *assumpsit* against the rest. But there is this further substantial difference, that the action in the one case, is founded on a contract which survives, and in the other, on a tort, which, at the common law, does not. In fact, the attempt here is to make an administrator liable. A plaintiff must proceed consistently. He cannot waive a part of the injury to give form to his action, and resume it to give substance. In waiving the trespass he dispenses with whatever could give character to the injury as such, and treats as a substantive and distinct cause of action, what would, in an action of trespass proper, be merely a circumstance of aggravation. In an action of *assumpsit*, therefore, he cannot claim the benefit of any of the incidents or attributes which appertain to an action of trespass. The consequence is, that the plaintiff here having recovered in trespass, cannot again recover in an action which is not a concurrent remedy; a recovery in trespass producing the same bar that is produced by a recovery in trover, against a recovery in *assumpsit* of the price of the same goods.

Judgment affirmed.

Cited by Counsel, 3 Penn. R. 463; 1 R. 355; 4 R. 277; 1 Wh. 311; 3 Wr. 56; 31 S. 491.

Cited by the Court, 3 W. & S. 107; 5 W. & S. 17.

[PHILADELPHIA, JANUARY 15, 1829.]

Elliott and Others, Executors of Field, *against* Walker and Another, Administrators of Wilson.

Cheever and Fales *against* the same.

IN ERROR.

The plaintiff being the defendants' supercargo, sold their goods on credit at a foreign port, and procured from a house at that port advances, on an assignment of the debts due from the purchasers of the cargo. These advances he remitted to his shippers in a return cargo. In his account sales of the outward cargo rendered to one of the shippers, he did not mention the names of the purchasers, but concluded it with "error, omissions, and outstanding debts excepted." In that rendered to the other shipper he mentioned the names of the purchasers, and concluded the account with "errors and omissions excepted." The purchasers having become insolvent, the foreign house which had made the advances, attached the plaintiff's property and recovered the amount of their advances, and the plaintiff brought suit against the consignors for reimbursement. Held, that he was entitled to recover.

[*Elliott and others, Executors of Field, v. Walker and another, Administrators of Wilson.*]

WRIT of error to the District Court for the city and county of *Philadelphia*. The defendants in error were the plaintiffs below.

[*127] *In these two causes, which depended upon the same facts and principles, a case was stated for the opinion of the court below, the substance of which was as follows :

On the 14th of March, 1820, the defendants consigned certain merchandize to John Wilson, the plaintiff's intestate, as supercargo of the schooner *Baltimore*, to be sold at Port-au-Prince, for account and risk of the consignors, with general discretionary powers on the subject. Wilson sold the goods at Port-au-Prince, on credit, and by a letter dated the 20th of April, informed the shippers that he had sold part of the consignment on a short credit, but did not state the names of the purchasers nor the term of credit. In his letters of the 26th of April and the 5th of May, he advises Field that he had not sold his nankeens, but informs Cheever & Fales that he had been fortunate with theirs, as the remainder of them had been disposed of at a short credit. In his letter of the 13th of June, he states, that he will ship the net proceeds of sales in coffee, but that not having received the Government expenses, he cannot exactly state the sum, which by the next opportunity to America he will do, enclosing a bill of lading at the same time. On the 17th of June, 1820, Wilson borrowed of Messrs. David Corry & Co., of Port-au-Prince, the merchants with whom he transacted his business, an advance of the net proceeds of the whole cargo, amounting to about the sum of seventeen thousand five hundred dollars, leaving that house to reimburse themselves by collecting the outstanding debts due upon the sales, from the different purchasers. This advance was made in green coffee, which was shipped from Port-au-Prince, to the several shippers by the schooner *Baltimore*, in the proportion of the proceeds of their several invoices. In the account of the sales of Field's shipment, the names of the purchasers were not mentioned, but it concluded with "errors, omissions, and outstanding debts excepted." In that rendered to Cheever & Fales the names of the purchasers were given, and the account concluded with "errors and omissions excepted." In consequence of a destructive fire which laid waste a great part of the city of Port-au-Prince, a few weeks after these sales were made, several of the purchasers of the defendant's goods became wholly insolvent, and the balances due from them were lost. The house of Corry & Co., demanded payment of their advances from Wilson, by whom they were referred to the consignors, who neglected to make payment.

[Elliott and others, Executors of Field, v. Walker and another, Administrators of Wilson.]

John Wilson died at Philadelphia, in the summer of 1821, and administration on his estate was granted to the plaintiffs. On the 4th of October, 1821, Messrs. Corry & Co., attached the property of Wilson at Port-au-Prince, for the balances claimed by them, and recovered. On the 3d of January, 1822, by order of the court at Port-au-Prince, the garnishees paid over to Messrs. Corry & Co. the amount of their claims, with costs; and the *present suits were brought to recover from [*128] the defendants the amount so paid, or the portion thereof due from each of the consignors with interest, and a proportion of the expenses of the suit at Port-au-Prince.

On this case which was agreed to be considered as a special verdict, the District Court rendered judgment for the plaintiffs, and the defendants took a writ of error.

Lowber, for the plaintiffs in error, contended, 1. That if an agent sell on credit, even within his authority, it is his duty, within a reasonable time, to inform his principal of the names of the purchasers, and the terms of sale.

2. That if the agent treat the security as his own, he makes himself the debtor to his principal; and if he has not paid he is liable to pay; if he has paid, he cannot recover back what he has paid. In support of these positions, he cited Paley on Agency, 27; 1 Campb. 411; 2 Campb. 546, (note); Id. 291; 1 Eng. Common Law Rep. 250; 1 Wash. C. C. Rep. 394, 445; *Oakley v. Renshaw*, 4 Cowen, 250.

Dunlap, for the defendants in error insisted, 1. That the principal was bound to repay his agent any losses which may have happened, not through his fault.

2. That the agent, though clothed with comprehensive powers, is not liable for losses, unless by his own fault. He cited *Livermore* on Factors, 11, 18, 73, 75, 463; *Ramsay v. Gardner*, 11 Johns. 439; *D'Arcey v. Lysle*, 5 Binn. 441; 3 Caines' Rep. 238; 1 Marsh. on Ins. 292; *Andrews v. Robinson*, 3 Campb. 198; *Wilkinson v. Winn*, 4 Campb. 177.

The opinion of the court was delivered by

ROGERS, J.—The payment of the balance of an account by a factor or commission merchant, to his principal, after the sales made, and for the purpose of closing the accounts between the parties, is an assumption of outstanding debts. And this is the principle of the case of *Oakley v. Renshaw*, 4 Cow. 205.

After the final settlement, the principal has the best grounds to suppose that the agent has been actually paid, or that he is

[*Elliott and others, Executors of Field, v. Walker and another, Administrators of Wilson.*]

content to take upon himself the responsibility of the purchaser. Where there is nothing in the transaction to rebut the inference, this is undoubtedly a fair presumption. To subject the principal, at any distance of time, when he has reason to suppose the business finally closed, would be a deception upon him, attended with danger and great inconvenience, and particularly in the case of a foreign creditor, who has no means of knowing the debtors, or guarding against imposition. In the absence of fraud or mistake, it would be unsafe to unravel such a transaction; for after final settlement, the principal gives himself no [*129] further concern, as he has a right to suppose *that the money has been received, or that the factor agrees to take upon himself the risk of the solvency of the purchaser. The difficulty in this case, arises not from any uncertainty in law, but in determining the nature of the settlement, or in other words, whether this was a final settlement, and so understood by the parties. In the letter of the 20th of April, Wilson informs the shippers, that he had sold part of the consignment on a short credit, but neither states the names of the purchaser nor mentions the term of credit, and we are left to conjecture whether short credit means sixty or ninety days, six months or a year. In the letters of the 26th of April and 5th of May, he advises Field, that he had not sold his nankeens, but informs Cheever & Fales, that he had been more fortunate with theirs, as the remainder of them had been disposed of at a short credit; but in the letter of the 13th of June, he says, he will ship the net proceeds of sales in coffee, but that not having received the Government expenses, he cannot exactly state the sum, which by the next opportunity to America, will be done, enclosing the bill of lading at the same time. On the 19th of June, the accounts of sales and bills of lading of the coffee were duly rendered to the shippers, in which I remark this difference. In the account of sales of Field's shipment, the names of the purchasers are not given, but it is expressly stated, in the usual mercantile manner, errors, omissions, and outstanding debts excepted. In the account of sales rendered to Cheever & Fales, the names of the purchasers are given, and it is stated, errors and omissions excepted. In the absence of all proof to the contrary, the inference is, that at the time the balance was paid, it was done with those accounts before them, and with express reference to them. There is then, no room for presumption, that the shippers supposed the debts had been paid; for it appeared in the accounts rendered that they had not. Nor can it be reasonably supposed, that Wilson intended to take upon himself the risk of their collection; for it is not pretended, he charged, or was allowed a

[Elliott and others, Executors of Field, v. Walker and another, Administrators of Wilson.]

del credere commission. If the shippers were aware that thy debts were outstanding, what injury had they sustained? They were not lulled into a false security, nor were they in any way deceived and why should they wish to throw the loss on an agent, who, it is acknowledged, acted in conformity to his instructions, and with the strictest regard to the interest of his employers. When a principal has reason to suppose that the business is finally closed, and a payment of the balance is made for that purpose, then he should be protected; but I cannot agree, that the mere payment of the balance of the account, without any accompanying circumstances, can have that effect. The case states, that money to the amount of seventeen thousand five hundred dollars, was taken up by Wilson, from Messrs. David Corry & Co., with a view of closing the sales at Port-au-Prince; but it is no where found, that the balance of the money was paid with the intention of closing the account [*130] *between the principal and agent, which is the turning point in *Oakley v. Renshaw*. It has been truly said, by the counsel for the plaintiffs in error, that if an agent sell on credit it is his duty, within a reasonable time, to inform his principal of the names of the purchasers, and the terms of sale. In such a case the agent would be answerable to his principal, in damages for any loss which may have been sustained by reason of his omission to give the necessary information. It does not, however, follow, that for this neglect, he shall at all events be made responsible for the solvency of the purchasers. The cases relied upon were *Edgar v. Bumstead*, 1 Campb. 411; *Bousfield v. Creswell*, 2 Campb. 545; *Simpson v. Swan*, 3 Campb. 291, and *Wilkinson, assignee of Gwynne, v. Clay*, 4 Campb. 170, are cases of insurance brokers, who enter into bonds, and by statute are bound to make known, upon every contract or bargain, the names of their principals. 1 Liv. on Agency, 73. They depend upon the well known course of dealing between the insurance broker, the merchant, and underwriter, and do not touch on the common course of trade, or agencies which have no such usages.

There is no doubt an obligation on the principal, (which the civilians call *obligatio mandato contraria*;) to repay his agent such sums of money, as the latter has necessarily expended in the execution of his commission; and to indemnify him for losses sustained by reason of his employment. To give rise to this obligation, it is necessary that the agent should have sustained some loss, on account of the agency, *ex causa mandati*, and that the loss should not have been caused by the agent's fault. These principles are recognized to the fullest extent in *D'Arcy*

[*Elliott and others, Executors of Field, v. Walker and another, Administrators of Wilson.*]

v. Lyle, 5 Binn. 441. The statement of the case clearly shows that the loss has been sustained on account of the agency, without any blame imputable to the agent, but from one of those accidents which the utmost vigilance of the plaintiff could not have prevented.

Judgment affirmed.

Cited by Counsel, 1 M. 140; 7 Barr, 285; 6 W. & S. 45.
Commented on by the Court, 6 Wh. 23; 6 W. & S. 412.

[*131]

*[*PHILADELPHIA, JANUARY 15, 1829.*]

Kershaw *against* Supplee.

IN ERROR.

Lease for fifteen years, reciting the intention of the lessees to erect a manufactory of cotton, &c. It was covenanted that if the lessor, his heirs, or assigns, should pay to the lessees the value of such buildings as they should erect, first giving three years' notice of the intention so to do, the lease should expire at the end of the fifteen years, otherwise to continue from three years to three years, until such notice and payment should be made, at the same rent. The lessor, for himself and his heirs, covenanted, at his and their cost, to keep the dam, race, &c., in good repair. The value of the buildings was not paid to the lessees. The lease was assigned, and the lessor having died, after having devised the reversion of the premises and other lands to his five children, the assignee of the lease became, by different conveyances, the owner of three-fifths of the reversion, in fee. The dam and race being out of repair, and the executor of the lessor not having, after notice, repaired the same, the assignee expended five hundred dollars in the necessary repairs, and brought an action against the executor of the lessor, to reimburse himself. It was agreed that the breach took place after the death of the lessor, and while the plaintiff was assignee of the lease, and owner of part of the reversion. Held, that the action could not be maintained.

It seems, that an action might be maintained against the two devisees who did not comply with the covenant to repair.

THIS case came before the court on a writ of error to the District Court for the city and county of *Philadelphia*, in which judgment was rendered for the defendant, upon a case stated in the nature of a special verdict.

The substance of the case is stated in the opinion of the court, which, after argument by *Rawle*, for the plaintiff in error, who cited 2 Selw. N. P. 95, and *J. R. Ingersoll*, contra, who cited Co. Litt. 223, a, sect. 361; Id. 338, b; Godb. 2; Moore, 54; 6 Bro. Par. Ca. 356; 5 Rep. 24, a; Willes, 585; Sir W. Jones's Rep. 245; Cro. Ca. 221,—was delivered by

HUSTON, J.—From the case, which I could wish was in some respects more fully stated, it appears that John Supplee, by in-

[Kershaw v. Supplee.]

denture dated the 30th of July, 1804, demised to William Mitchell and John G. Baxter, their executors, and administrators and assigns, certain premises in Blockley township, for the term of fifteen years, reciting the intention of the lessees to erect thereon certain mills for carrying on a manufactory of cotton, &c.; and it was covenanted that if the lessor, his heirs or assigns shall pay to the lessees the value of such buildings as they shall erect, (which value is to be ascertained in a mode prescribed,) first giving three years' notice of the intention so to do, the lease shall expire at the end of fifteen years, otherwise to continue from three years to three years until such notice and payment, at the same rent. "And the said John Supplee for himself and his heirs, doth hereby covenant and agree, at his and *their own cost, to keep the dam, race, and other reservoirs of water necessary for the supply of the mills, in [*132] good repair."

The value of the buildings has not been paid to the lessees — Kershaw, the plaintiff, is assignee of the lessees; and John Supplee having died and devised the reversion of this and other lands after the death of his wife, who has since died, to his five children—Kershaw has, by different conveyances, become the owner of three-fifths of the reversion, in fee.

The dam and race being out of repair, and the executor of John Supplee not having, after notice, repaired the same, Kershaw, the plaintiff, has expended five hundred dollars in the necessary repairs thereof, and brought this action to obtain reimbursement.

John Supplee died in 1804. His personal estate has been fully administered.

It is agreed that the breach took place after the death of the lessor, and during the time when the plaintiff was assignee of the lessees, and part owner of the reversion.

The above facts are taken from the case, and are all the facts contained in it. From the lease and will referred to and which may be considered part of it, we are to understand that John Supplee, before the lease, owned a tract of land and mill—that the lessees were to have but a small part of that tract, and were to continue the race already made to Supplee's mill, past his mill to the building they were to erect. The dam, and that part of the race from the dam to Supplee's mill, were not on the premises demised, and it is not stated whether Kershaw is the owner of three-fifths of the tract on which the dam is, or only of three-fifths of the part demised—perhaps this may be immaterial.

Two questions are submitted: 1. Whether the plaintiff can recover on the covenant in this lease?

[*Kershaw v. Supplee.*]

2. In what manner execution must be issued; that is, whether the parts purchased, and now held by James Kershaw, are liable?

There are several objections to the plaintiff's recovery. By the purchase of the fee simple of three-fifths, the term for years for those three-fifths is extinguished; for nothing is better settled than that where a term for years, or life, exists in a person in his own right, and he subsequently acquires the fee in his own right, the former is lost and merged in the latter. Where the term and the fee unite in the same person, but in different rights it is otherwise; so if the term is created for a special purpose not yet accomplished, and to be kept separate until that object is effected, equity considers them distinct; but if they had not entirely united, or rather if the term was not merged in the fee in this case, yet as Kershaw, as owner of the fee, is liable to keep up the dam and reservoirs, for himself or tenant, and as he cannot sue himself even joined with others, his situation is one of some difficulty, where we have no Court of Chancery.

He has brought suit, not against the two devisees of John Supplee *from whom he has not purchased, and who have [*133] broken the covenant, but against the executor of John Supplee. I admit that generally the executor is liable to any action of covenant, wherever his testator was liable, if it be not determined by the death of the testator, or as some books say, if it be not personal to the testator, and to be performed by him alone, or if the breach be not in the time of the testator. (See 2 Bac. Ab. Covenant, F., and cases there cited, and 3 Com. Dig. Cov. C. 1;) or, if it be not such a covenant as is to be performed by the person of the testator, and which the executor cannot perform. Cro. Eliz. 552, 553.

The modern decisions put it on more liberal, and I think, more satisfactory ground; viz., the true meaning of the contract. To be sure a man may covenant that an act shall be performed by another, and if it appear that he did so, and was understood at the time so to do, and this appears by the instrument, he is bound, and so are his executors, though he never derived any benefit, and though all the benefit has accrued to another. 2 Burr. 1190. The covenant here is, "The said John Supplee, for himself and his heirs, doth hereby covenant and agree, at his and their own cost, to keep the dam, &c., in repair." This covenant runs with the land and binds the heirs, and the devisees as assignees, and the assignees, though not named. Did he intend to bind his executors, that his heirs or assignees should keep up the dam, or did he mean to bind his heirs or assigns to keep it up, and to give an action against them if they neglected

[Kershaw v. Supplee.]

or refused so to do? He could enter into either of the covenants: the first would bind his personal representatives, the latter the owner of the fee, and the words seem to import the latter covenant. His executors cannot enter on the land to make the repairs without being trespassers. The covenant must be performed by the owner of the land; by John Supplee, while owner, by his heirs or assignees after his death, or after a sale by him. It is better for the tenant that this construction be put on it. John Supplee's executors, and John Supplee's estate may have no existence in a few years; but the covenant running with the land and binding whoever becomes owners, must give security to the tenant for ever. If it is said both may be bound, I admit it; and if the fair import of the words and spirit of the contract appeared to me to bind both, I would say they are bound. I think the executors are not liable to this action, because neither the words nor the intention seem to include them; because they cannot comply with this covenant; they would be trespassers by going on the land and digging or building. If liable it is for what has occurred in their own time; for not performing a covenant which they could not perform, and because the effect of a judgment would be that the plaintiff must take an execution against his own lands, for a judgment against the executors would bind all, and might be levied on any lands which belonged to John Supplee, at his death. But it is said, though the judgment was for the whole five hundred dollars, three-fifths would be struck out of the *execution or marked not to be collected. But more must be done; it must issue [*134] against the two-fifths still belonging to the two children of Supplee: in other words, a general judgment against the estate of Supplee, must be collected by an execution on the shares of two out of five of his devisees. John Supplee had, it is stated, other lands, and the execution, I admit, could be levied on any one tract, though that tract belonged entirely to one devisee: but I deny that where land is undivided among heirs or devisees, an execution on a general judgment against the father could be levied on the undivided share of any one child.

Three of the heirs have sold to Kershaw; this judgment may be levied on other lands devised to them by their father, and those lands sold; but those three have broken no covenant, have been in no default, their father broke no covenant, his executors have broken none; they are then liable for a breach of which they are not guilty. It will not do to say they may bring suit and get compensation from the two who have broken the covenant; our law does not punish the innocent for the acts of the guilty, unless where they or their ancestor have made them responsible for those acts, which is not the case on this agree-

[Kershaw v. Supplee.]

ment, and it is not the least objection to this action that the plaintiff is, in fact, carrying on a suit against himself: his judgment, and his execution must be, in substance against himself; for before he can take an execution for the shares of the two devisees, he must get a judgment against the two devisees.

I have no doubt of the power of this court to interpose its equitable powers in an action of covenant as much as in any other form of action. We have an early and strong case of this kind. 1 Dall. 210,—where, in covenant for rent, the court held the tenant not liable, because he did not and could not enjoy the property. But equitable power is exercised, when the party sued in justice and conscience ought to pay; not where the defendant has been in no default, has violated no contract: in such a case, if he can escape at law, equity does not hold him liable. If a suit shall be brought against the two devisees, who have not complied with a covenant which binds them, I should not be willing to permit them to escape because the form of action, or the nature of their interest, would compel the injured party to apply to chancery, where there is a Court of Chancery.

Judgment affirmed.

Cited by Counsel, 2 Penn. R. 477; 8 W. & S. 431; 11 Wright, 286.

[*135]

*[PHILADELPHIA, JANUARY 24, 1829.]

Davis *against* Shoemaker.

IN ERROR.

The act of March 27, 1713, for the limitation of actions, is not a bar to the recovery of rent reserved by indenture.

In an action of debt for rent reserved by indenture, the plaintiff may state in his declaration the substance of the demise, and is not bound to declare upon the deed; and, if to such a declaration the defendant pleads *nil habuit in tenementis*, *actio non accrevit infra sex annos*, or any plea which is *prima facie* a good plea, no estoppel appearing on the record, the plaintiff may reply, that the lease was by indenture, and such a replication will not be a departure.

Under the plea of *nil debet* to a declaration stating a demise generally, the defendant may give the statute of limitations in evidence. (*Semble.*)

THIS was a writ of error to the District Court for the city and county of Philadelphia, where judgment had been entered for the defendant in error, upon the following declaration and subsequent pleadings:—

James Davis, late of the township of Moyamensing, in the county aforesaid, blacksmith, was summoned to answer David Shoemaker, of a plea that he render unto him the sum of two hundred and ten dollars, which he owes to and unjustly detains

[Davis v. Shoemaker.]

from him. And whereupon the said David, by Henry Shoemaker, his attorney, says, that whereas the said David, heretofore, to wit, on the third day of July, in the year one thousand eight hundred and ten, at the county aforesaid, demised to the said James a certain lot or piece of land, with the appurtenances, situate in the township and county aforesaid, to have and to hold the same to the said James for a certain term of years, to wit, for and during, and until the full end and term of seven years, to commence from the first day of January then next ensuing, and fully to be complete and ended: Yielding and paying, therefor, during the said term, to the said plaintiff the yearly rent of thirty dollars; that is to say, on the first day of January, in the year one thousand eight hundred and twelve, thirty dollars, and on the first day of January, yearly, in each succeeding year, thirty dollars for and during the said term. By virtue of the said demise, the said defendant entered into the said demised premises, with the appurtenances, and was possessed thereof henceforth until the first day of January, in the year one thousand eight hundred and eighteen, when a large sum of money, to wit, the sum of two hundred and ten dollars, the rent aforesaid for the space of seven years then elapsed became and was due and payable from the said defendant to the said plaintiff, and still is in arrear and unpaid to the said plaintiff, to wit, at, &c., aforesaid. Whereby an action hath accrued to the said plaintiff, to demand and have from the said defendant the sum of two hundred and ten dollars.

*And whereas also the said James Davis afterwards, to wit, on, &c. at, &c. aforesaid, was indebted to the said [136] David Shoemaker in the sum of two hundred and ten dollars, for the use and occupation of a certain lot or piece of land, with the appurtenances of the said plaintiff, situate, &c., by the said defendant, and at his special instance and request, and by the sufferance and permission of the said plaintiff for a long space of time before then elapsed had, held, used, occupied and enjoyed, and to be paid by the defendant to the said plaintiff, when the said defendant should be thereunto afterwards requested. Yet the said defendant (although often requested so to do,) hath not as yet paid the said sum of two hundred and ten dollars above demanded, or any part thereof, to the said plaintiff. But he to do this hath hitherto wholly refused, and still doth refuse: To the damage of the said plaintiff of one hundred dollars, and therefore he brings his suit, &c.

In the District Court for the city and county of *Philadelphia*,
March Term, 1825, No. 254.

[*Davis v. Shoemaker.*]

James Davis } And the said James Davis, by Edward
ats. } D. Ingraham, his attorney, comes and de-
 David Shoemaker. } fends the wrong and injury, when, &c. and
 says that he does not owe the said sum of money above demanded,
 or any part thereof, in manner and form as the said David Shoe-
 maker hath above thereof complained against him, and of this
 he the said James puts himself upon the country, &c.

And, for a further plea in this behalf, the said James Davis,
 by leave of the court here for this purpose first had and obtained,
 according to the form of the statute in such case made and pro-
 vided, says, that the said David Shoemaker ought not to have
 or maintain his aforesaid action thereof against him, because he
 says, that the said several supposed causes of action in the said
 declaration mentioned did not, nor did any of them, accrue to
 the said David Shoemaker at any time within six years next
 before the commencement of this suit, in manner and form as the
 said David Shoemaker hath above thereof complained against
 him, the said James Davis. And this he the said James Davis
 is ready to verify; wherefore he prays judgment, if the said
 David Shoemaker ought to have or maintain his aforesaid action
 thereof against him, &c.

In the District Court for the city and county of *Philadelphia*,
 No. 254, March Term, 1825.

Shoemaker } And the said David Shoemaker, as to the plea
v. } of the said James Davis by him first above pleaded,
 Davis. } and whereof he hath put himself upon the country,
 doth the like.

[*137] *And the said David Shoemaker, as to the plea of the
 said James Davis, by him secondly above pleaded, ac-
 cording to the form of the act of the general assembly of this
 commonwealth, passed the twenty-first day of March, in the
 year one thousand eight hundred and six, for the purpose, enti-
 tled, "An act to regulate arbitrations and proceedings in courts
 of justice," saith, that the said James Davis ought not to be ad-
 mitted or received to plead the said plea by him secondly above
 pleaded, as to so much thereof wherein he alleges, "that the
 said several supposed causes of action in the said declaration
 mentioned did not, nor did any of them, accrue to the said
 David Shoemaker, at any time within six years next before the
 commencement of this suit," because he says, that the said James
 Davis contracted in writing with him for the possession of the
 said lot of ground, for a term of years, as aforesaid, dated the
 third day of July, in the year one thousand eight hundred and
 ten, the said contract being signed by and sealed with the seal

[Davis v. Shoemaker.]

of the said James Davis, and now here shown to the court ; whereby it appears, that the said James Davis is justly indebted to the said David Shoemaker in the said several sums of money in the said declaration mentioned, and this the said David Shoemaker is ready to verify ; wherefore he prays judgment if the said James Davis ought to be admitted or received against his own acknowledgment by his deed aforesaid to plead the plea by him lastly above pleaded in this suit ; “that the said several supposed causes of action in the said declaration mentioned did not, nor did any of them, accrue to the said David Shoemaker at any time within six years before the commencement of this suit,” &c.

In the District Court for the city and county of *Philadelphia*, March Term, 1825, No. 254.

David Shoemaker	}	And the said James Davis saith, that the said replication of the said David Shoemaker to the said second plea of him the said James Davis, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said David Shoemaker to have or maintain his aforesaid action against him, the said James Davis, and that he, the said James Davis, is not bound by the law of the land to answer the same, and this he, the said James Davis, is ready to verify : Wherefore, for want of a sufficient replication in this behalf, he, the said James Davis, prays judgment if the said David Shoemaker ought to have or maintain his aforesaid action against him, &c.
v. James Davis.		

The errors assigned were, 1. That the act of March 27th, 1713, “for limitation of actions,” was a bar to the action of the defendant in error, Shoemaker.

*2. That the court below should have given judgment in favour of the said plaintiff in error, because the replication of the said David Shoemaker to the second plea of the said James Davis is a departure from the case made by the declaration of the said David Shoemaker. [*138]

Ingraham, for the plaintiff in error.—First, as to the statute of limitations. The language of the act of assembly is not the same as that of the English statute, and a different construction must be the consequence. The words, “all actions of debt for arrearages of rent, except the proprietaries’ quit rents,” can only be satisfied by including the present action. The words of the English statute are simply, “all actions of debt for arrear-

[Davis v. Shoemaker.]

ages of rent," (Ruffh. Stat. vol. 3, 101;) and the judicial view taken of them would perhaps include this case, if the old decision in Hutton's Reports, (*Freeman v. Stacey*, page 109,) be law, which is very doubtful; but there can scarcely be a doubt that those who took the English statute for their guide intended to create a difference by the use of words, "except the proprietaries' quit rents," as it is certain that the addition was not accidental; for it appears, by a reference to the Votes of Assembly, (vol. 2, page 124,) that the act of assembly was prepared under the direction of a lawyer. It is impossible not to apply, in relation to this alteration in the language of an act of assembly, evidently copied from the statute of James, the reasoning of Chief Justice Tilghman, in *Ewing v. Tees*, 1 Binn. 455, upon the English statute of frauds and our act of assembly upon the same subject. And this construction is fortified by the fact, that it was unnecessary to say a word upon the proprietaries' quit rents; for they would have been protected completely under the decision in Hutton, which took place in 1652, and was printed in 1682, more than thirty years before the act of assembly was passed. If the additional words be considered as merely evidence of the intention of the legislature, they are conclusive, and the clause will be properly read: "All actions of debt for arrears of rent shall be barred by the statute of limitations, except where such actions are brought by the proprietary for arrearages of quit rent." It is the more reasonable construction, because, after all, the obligation to pay as founded upon the occupation of the land by the lessee, the indenture is mere inducement, and need not be set out in the declaration. And, though the party might recover in covenant upon the deed without occupation, he never could in debt. 1 Saund. 39.

Second. As to the pleadings.—Debt lies for use and occupation, where the demise is not under seal, 1 Chit. Pl. 98, because *indebitatus assumpsit* would lie. But the count for use and occupation is not sustainable where there is a demise by deed: it is meant to help a doubtful case, (2 Chit. Pl. 431,) which this was not, as Shoemaker had the deed himself, and replied that the demise was by deed, to the plea of the statute. This [*139] whole declaration would be *sustained only by showing a parol demise; though the first count, standing by itself, would do, if the holding turned out to be by deed. The course here would have been for the plaintiff, as there was no demurrer to the declaration, to have nonprossed the second count.

The substance of this replication—which is very inartificially drawn—is a departure from the case made by the declaration, (*Marshall's Argument in Trueman v. Hurst*, 1 T. R. 40;) and

[Davis v. Shoemaker.]

the very mischief produced by a departure has occurred here. When the plea meets the case made by the declaration, the plaintiff shows another cause of action by his replication. It abandons the first case made to present another. The Limekiln Case, (1 Chit. Pl. 635,) is in point exactly. The replication tenders us an issue upon a fact not set forth in the declaration at all, and perfectly immaterial, if the argument on the first point be right.

Shoemaker, for the defendant in error.—This action is debt for rent in arrear reserved by indenture, and was brought to recover of the plaintiff in error seven years' rent for a lot in Moyamensing township. The rent in this case is due by the lease; *Salmon v. Smith*, 1 Saund. 203, n. 1; *Duppa v. Mayo*, Id. 276, n. 1 and 2; *Eaton v. Jaques*, 2 Doug. 461; and authorities cited in that case. The declaration contains two counts; the first sets forth the orderly parts of the lease—the day of making it—the annual rent the tenant is to pay—the length of time he is to possess the land;—and concludes *per quod actio accrevit*, 1 Chitty, 346. The second is put in without stating the local situation of the premises, and is therefore merely surplusage, (1 Chitty, 618,) and forms no part of the case; 2 Chitty, 223, notes d. and p. In no part of the narr. is it stated that the lease is in writing, though, to entitle the plaintiff in error to recover, he must prove it so in evidence. It is the only instance where a deed may be given in evidence in support of a count in which it is not mentioned; 1 Chitty, 348. Authorities need not be cited to show, that at common law leases were valid without writing. Our act of assembly (Purd. Dig. 516), makes them invalid three years after the making, if they are not put in writing. Then the question occurs, as this lease is for more than three years, whether the act of assembly has altered the manner of pleading, if the requisites of the act have been complied with. That it has not, the authorities are abundant to show. The law is, that where a statute makes writing necessary to the validity of a matter, when it was not so at the common law, the manner of pleading is not thereby altered; it may be given in evidence; 1 Chitty, 348; *Atty et al. v. Parish et al.*, 4 Bos. & Pull. 104, 109; *Birch v. Bellamy*, 12 Mod. 540; 2 Chitty, 223, note d; 6 Bac. Ab. 395. The pleas of the plaintiff in error are *nil debet*, and the statute of limitations. Issue is joined on the first. The second is a plea, because no estoppel appeared on the record, but the defendant in error replied in bar to *it, that the rent is reserved by indenture, [*140] and prayed the judgment of the court if the defendant ought to be admitted against his deed to plead that plea. The

[Davis v. Shoemaker.]

demurrer to this replication acknowledges the deed; Stephens on Pl. 159, 160. The defendant in error joins in demurrer, relying upon the estoppel now on the record, and prays judgment of his debt and damages; Veale v. Warner, 1 Saund. 325, note 4; Speake v. Richards, Hob. 206, 207. It is not merely matter of form to conclude an estoppel without relying on it, for by not doing so the party may often lose the advantage of the estoppel which the law gives him. Now, the question occurs, whether the defendant in error has not, in his replication to the plaintiff in error's plea of the statute of limitations departed from his case? What is his case? It is that the plaintiff in error leased a lot of him for seven years at thirty dollars a year, and that the whole rent is due. The replication says the lease is in writing, under his hand and seal. Does not the replication support and fortify this case? How can it be said that the defendant in error has committed a departure, when the replication supports and fortifies the declaration? 1 Chitty, 619, 622; Richards v. Hodges, 2 Saund. 84, a; note 1. Why is not *nil debet* a plea when the deed is declared on in the first instance? Because it is not necessary to declare on it at all; and you shall not deprive the party of the advantage which the law gives him; Jones v. Pope, 1 Saund. 39, n. 3; 1 Chitty, 477. The remaining question on the record is, whether the statute of limitations is a bar to the action. It is no bar, because the action is grounded on a contract with specialty; Purd. Dig. 530; Freeman v. Stacie, Hutton's Rep. 109; Hodsdon v. Harridge, 2 Saund. 66; Richards v. Bickley, 13 Serg. & Rawle, 395.

The opinion of the court was delivered by

GIBSON, C. J.—The act of 1713, is copied nearly word for word from the 21 Jac. 1, c. 16; and, although the latter extends to all actions of debt for rent, it has been determined that the statute is a bar to the recovery of rent reserved only on leases by parol; a lease by indenture being equal to a specialty; (Hutt. 109, pl. 2). The same principle is admitted in Hodsdon v. Harridge, (2 Saund. 66). And this construction is, no doubt, in accordance with the actual intent of the legislature; for it would have been nugatory to protect the lessee from an action of debt, and leave him exposed to an action of covenant, clearly maintained on the indenture, to which the statute does not extend.

The remaining point is equally simple. It is settled, that in debt for rent, the plaintiff may state the substance of the demise without declaring on the deed; and where it is doubtful whether the lease were by indenture or parol, it is usual to de

[Davis v. Shoemaker.]

so, adding a count for use and occupation by way of further caution; (2 Chitty on Plead. 223, note d). And to such a declaration the plaintiff may plead *nil *debet*; or, as no estoppel appears of record, *nil habuit in tenementis*, which is [*141] *prima facie* a good plea, and the plaintiff must thereupon reply that the lease was by indenture; for if he replies a sufficient estate in the premises generally, he waives the benefit of the estoppel; (1 Saund. 276, note 1). Here the defendant might have given the statute in evidence under *nil debet*, (Salk. 278, pl. 1); but, having pleaded it, the plaintiff had no other course than to reply that the demise was by deed. The demurrer to the replication was therefore properly overruled.

Judgment affirmed.

Cited by Counsel, 8 Barr. 283; 4 Wr. 307; 13 S. 132; 9 N. 365; s. c. 8 W. N. C. 5.

[PHILADELPHIA, JANUARY 15, 1829.]

Langer against Felton.

IN ERROR.

There is no estoppel but between the parties to a deed.
A party to a fraud is competent to prove it.

WRIT of error to the Court of Common Pleas of *Philadelphia* county.

Felton, the plaintiff below, brought an action for money had and received against Langer, the plaintiff in error. On the trial the plaintiff below offered to prove, by one Catharine Dredger, that the defendant had acknowledged that he acted as the agent of the plaintiff in purchasing a certain lot of ground from John Dredger, the husband of the said Catharine, and herself: That he also acknowledged that he had received from the plaintiff, for the purpose of paying in part for the said lot, the sum of one hundred dollars: That the price agreed upon between the said John Dredger and the defendant, for the said lot, was one hundred and fifty dollars: That the defendant paid to John Dredger, towards the price of the said lot, fifty dollars only, and that the balance of the said purchase money, to wit, one hundred dollars, was secured by a mortgage given by the plaintiff to the deponent's husband, John Dredger: That the deed and mortgage were prepared by the defendant, and that the witness could not read.

To the admission of this evidence, the counsel for the defend-

[*Langer v. Felton.*]

ant objected, and in order to enforce the said objection, he produced and exhibited to the court, a deed from the said John Dredger and wife, to the plaintiff for the said lot, dated the day of _____, 1824, and a mortgage executed by the plaintiff to the said John Dredger, dated the _____ day of _____, 1824, to secure the payment of one hundred dollars, and referred the court particularly to the consideration money stated in the deed, and the receipt for the same signed by the said John Dredger. [*142] But the said court overruled the said *objection, and permitted the witness to be examined as to the facts offered to be proved. To this opinion the defendant's counsel excepted.

Phillips, for the plaintiff in error.—The witness was not competent. She could not be permitted to contradict her acknowledgment in the deed.

Dallas, contra, was stopped by the court.

PER CURIAM.—There is no estoppel but between the parties to the deed. But here the offer was to prove a fraud; and there is no principle clearer than that a party to the fraud is competent to prove it.

Judgment affirmed.

[PHILADELPHIA, JANUARY 24, 1829.]

Simmons *against* The Commonwealth.

IN ERROR.

An indictment is not vitiated by stating an offence to have been committed on the first March instead of the first day of March.

In an indictment for fornication and bastardy, an omission to state the sex of the child, is fatal.

THIS was a writ of error to the Court of Quarter Sessions of the county of *Philadelphia*, in which the plaintiff in error, Henry Simmons, was found guilty and sentenced upon an indictment for fornication and bastardy. The indictment set forth that Simmons, "on the first March, in the year of our Lord one thousand eight hundred and twenty-eight, at the county aforesaid, &c., did commit fornication with a certain Caroline Black, and a bastard child on the body of her, the said Caroline, then and there did beget," &c.

Three errors were assigned in the judgment of the court of

[*Simmons v. The Commonwealth.*]

Quarter Sessions, of which the two following only are material, viz.

1. That the indictment stated no day of the month on which the offence, therein set forth, was committed.

2. That it did not state the sex of the child.

Brewster, for the plaintiff in error, cited 4 Binn. 541; 1 Browne's Rep. 59; 1 Chitty's Crim. L. 179, 217; 2 Chitty's Crim. L. 522.

Care, for the commonwealth, referred to *Duncan v. Commonwealth*, 4 Serg. & Rawle, 449.

The opinion of the court was delivered by

TOD, J.—The expression on the first March, leaving out the words day of, careless as it is in an indictment, might be suffered to *pass. But the omission of the sex of the child appears substantial error. In practice, throughout the [*143] commonwealth, I take the precedents to be uniform. In the *Commonwealth v. Pintard*, 1 Browne, 59, the omission was held fatal. Our method by indictment in these cases comes in lieu of the English proceedings of justices of the peace, by an order of filiation, in which the precedents invariably require the sex to be stated. In *Rex v. England*, 1 Stra. 503, this omission appearing, the order of the justices was reversed for that reason only. It is argued that the sex of the child is a matter wholly unconnected with the substance of the offence. Perhaps this is true. But it may as well be argued that the name of the mother is also a matter unconnected with the substance of the offence, and therefore might be omitted. And by the same rule, in every criminal case, it might be contended that it is sufficient to state the bare fact, or name of the crime, leaving out all the usual matters of circumstance and description. In these things precedent is law. But there is utility in the rule. Over and above the common reasons of the law for requiring minuteness of description in an indictment, there seems other reasons why, in this case, the record should identify the child as accurately as may be, as it affords almost the only evidence of the relation between the child and the father; a relation which, imperfect as it is, gives some rights and imposes some restraints. 1 Com. Dig. 459; *Macklin v. Taylor*, Addis. 212.

Judgment reversed.

Cited by Counsel, 8 W. 213; 14 W. N. C. 171.

An indictment for bastardy, stating that the accused in the county aforesaid did beget a male bastard child on the body of A. B. is not defective in not stating that the child was born, or that he was born in the county: *Commonwealth v. Menefee*. 14 W. N. C. 170. (Q. S.)

[PHILADELPHIA, JANUARY 24, 1829.]

Fox against Wood.

IN ERROR.

The officer who executes a warrant for the collection of militia fines, is not bound to know that the person on whom he is directed to execute it, is an exempt.

If the minutes of the proceedings of a Court of Appeals are lost, the substance of their contents may be proved. Consequently, a warrant proved to have been copied from the return of a Court of Appeals and compared with it, is competent evidence to be left to the jury.

To show that a Court of Appeals was regularly constituted, it is necessary to produce the commission of the officer, by whose order it was constituted and those of the officers who composed it.

WRIT of error to the District Court for the city and county of *Philadelphia*, in an action of trespass brought by David C. Wood, the defendant in error and plaintiff below, against George Fox, the plaintiff in error and defendant below, who was a collector of militia fines, for an arrest and imprisonment of the plaintiff's person, as a delinquent militia man.

[*144] *On the trial of the cause, the defendant, in pursuance of notice from the plaintiff, produced the original warrant under which he acted, signed by George F. Hailer, captain, and countersigned by Robert Patterson, colonel, dated the 2nd of June, 1820, authorizing the defendant to collect the fines from the persons named therein, among whom was the plaintiff; which was read in evidence by the plaintiff. The warrant was as follows:—

“The Commonwealth of Pennsylvania.”

“To George Fox ——— greeting———.

“Whereas, the persons named in the schedule or list hereunto annexed, have, by the Court of Appeals of their proper battalion, been duly sentenced to pay the fines to their names respectively subjoined; this warrant, therefore, authorizes and requires you to demand and receive of all and each of the persons named in the said schedule, the amount of fines to their names respectively annexed: And in case of the refusal of all or any of them to pay the same, then to levy the said debt and costs, of the goods and chattels of all or any of the delinquents named in your schedule annexed, by distress and sale thereof, returning the overplus, if any, to the owner or owners respectively; but for want of such effects, then to take the body or bodies of such persons

[Fox v. Wood.]

named in the said list respectively, to the jail of the county where the delinquents reside, there to be detained until the fine and costs shall be paid or satisfied, or he or they shall be otherwise legally discharged. Witness my hand and seal this 30th day of May, 1820.

Signed

“GEORGE F. HAILER,
“Captain of the 5th Company.

“Approved, ROBERT PATTERSON,
“Colonel of the 72d regt. P. M.”

The defendant gave in evidence the commission of the said George F. Hailer, as captain of the 5th company, 72d regiment of Pennsylvania militia, and produced, as a witness, Robert Patterson, who proved that in May, 1820, he was colonel of the 72d regiment of Pennsylvania militia, and had in his possession the papers of the regiment and company; the returns to the Court of Appeals, and the returns made by the Court of Appeals: That he had searched for the papers on which the warrant was founded, but could not find them: That he had them and could only account for their absence by a belief that they were destroyed or thrown aside in consequence of the former counsel in the suit having told him the suit was stopped, and the matter settled: That the warrant in this case was in the handwriting of a former partner of the witness, who copied it from the return of the Court of Appeals, and that he and the witness had compared them together.

The defendant also gave in evidence the appointment of the Court of Appeals, as published in the *American Sentinel*, which Colonel Patterson verified on oath.

*The court below charged the jury that to justify the arrest, the defendant must prove that a Court of Appeals [*145] was held; consisting of three commissioned officers: That they were appointed by the colonel, and were under oath or affirmation to perform their duties faithfully and impartially, and that the only legal evidence of this was the proceedings or minutes of the Court of Appeals, regularly authenticated, and the commission of the officer appointing, and those of the officers composing the Court: That the defendant had failed to do this in every particular: That if the proceedings were lost or destroyed, it was his misfortune, and the plaintiff had a right to call for complete evidence of the authority by which he had been deprived of his liberty.

The court also charged that the defendant knew, or was bound to know, that the plaintiff was an exempt; and nothing but great carelessness, to say the least of it, could have produced the insertion of the plaintiff's name in the warrant on the part of the

[Fox v. Wood.]

militia officers : That the defendant's proceedings were wholly unwarranted by law, and he could not shelter himself under the plea of obedience to his superiors : That he was bound to make out a complete justification, and the plaintiff was therefore entitled to damages.

To this opinion the counsel for the defendant excepted, and in this court assigned the following errors :

1. Because the warrant given in evidence by the defendant below, in pursuance of the call of the plaintiff, was a sufficient justification of the defendant under the circumstances of the case.

2. Because the court did not charge, that the proceedings of the Court of Appeals and the warrant founded thereon, were a legal justification of the defendant.

3. Because the court charged, that the defendant, a collector of militia fines, was bound to know, that the plaintiff was an exempt, although he was not a party to the proceedings of the court martial.

4. Because the court charged that if the proceedings of a court martial were lost, no secondary evidence could be given of them, and that all persons who acted under the authority of such proceedings must, after their loss, be treated as trespassers.

The cause was argued by *R. Randall*, and *J. Randall*, for the plaintiff in error, who cited 1 Wash. C. C. Rep. 433 ; 3 Serg. & Rawle, 169 ; 4 Serg. & Rawle, 83 ; 2 Starkie, 156.

D. P. Brown and *Rawle*, for the defendant in error, cited 2 Binn. 209 ; 3 Serg. & Rawle, 369.

The opinion of the court was delivered by

GIBSON, C. J.—Whether a court martial has jurisdiction of the person of an exempt, is I apprehended, not open to debate ; it having been ruled during the last term of this court at Chambersburg, that the liability of the accused to military duty, is the foundation of the whole charge, and consequently that the adjudication of the court on this, as on every other fact necessary [*146] to be made out by the prosecutor, *is conclusive where the same fact again comes into controversy. The District Court, therefore, erred in charging that the officer who executed the warrant, was bound to know that the plaintiff was an exempt. There was also error in charging, as it seems to me the court did, that if the minutes of the proceedings were lost, the substance of their contents could not be proved by secondary evidence ; and although this might be immaterial, if second-

[Fox v. Wood.]

any evidence had in fact not been given, yet it would seem, that the warrant proved by Colonel Patterson to have been copied from the minutes, and afterwards compared with them, was competent evidence to be left to the jury. There was, however, no error in any other part of the charge. It was essentially necessary to show the authority of the officer by whose order the court was constituted, and of the members by whom it was composed, and this, if disputed, could be done only by producing their commissions. If the defendant fail in this, there must be a verdict against him, for it is certain that a warrant unsustained by the sentence of a court regularly constituted, affords no protection.

HUSTON, J., (after stating the facts and the charge of the court below,) delivered the following opinion.

The requisites to constitute a legal court of appeals is correctly set out in the first paragraph of the charge. This is not questioned. The act is express, and a decision of this court in *Wilson v. John*, 2 Binn. 209, had settled that this must be shown by the collector when sued as a trespasser. The commission of the officer appointing the court martial, of each of the officers composing it, and that they were sworn, must appear, or the defendant is not justified. If any of the commissions are lost, the fact that they existed, and their contents, may be proved. *Moore v. Houston*, 3 Serg. & Rawle, 191. But, in this case, no evidence was given or offered, of the existence or loss of the commission of the colonel; no evidence that he appointed the court of appeals; that it was composed of commissioned officers; that they were sworn, or that they met or acted. The want of all this is now alleged to be cured, because it would seem the defendant, after the plaintiff had made out his case, handed him his warrant, and the plaintiff's counsel read it; but it was no part of his case, and was the *sine qua non* of the defendant's defence. There may be instances where the plaintiff, to make out his own case, must read a deed, or book, or document; and, it being part of his case, and without which he could not recover, he may be precluded from contradicting or denying it. The rule is a strict one, and has some limitations not necessary to be mentioned here; for this evidence was not necessary to the plaintiff's case. It would seem the jailer was reading his copy, (wholly unnecessary,) and the defendant handed the original. I should be sorry if the rights of parties depended on matters so trifling. This case does not come within the rule, and it must be considered as it *was below, as really the defendant's [*147] evidence, and his sole pretence of defence.

The second error assigned is, because the court did not charge
VOL. I.—11

[Fox v. Wood]

the jury, that the proceedings of the court of appeals and warrant were a legal justification of the defendant. Now I have shown the court had no evidence, legal or illegal, that there ever was a court of appeals in that regiment.

The last error assigned, and it includes all the others, is, "because the court charged the jury, that if the proceedings of the court martial were lost, no secondary evidence could be given of them, and that the persons who acted under the authority of such proceedings, must, after their loss, be treated as trespassers."

In the first place, the court said no such thing. There was no secondary evidence offered of the appointment, commissions, oaths, or proceedings of the Court of Appeals, or of any part of them, except the schedule annexed to the warrant; and the judge did not say one word about secondary evidence in the cause. As none was offered, it was not in his mind. He does say, the only legal evidence is, as decided in 2 Binn. 209, and cites it. If secondary evidence had been offered, he must have decided on its admissibility first, and its effect afterwards. He says again, the plaintiff has a right to call for complete evidence of the authority by which he was deprived of his liberty. Now, complete evidence cannot mean more than legal evidence. The defendant having omitted to offer secondary evidence, after having proved the loss of some of the documents, omitted to prove, or to offer to prove, the contents of them; nay, even omitted to produce the commissions which were not stated to be lost, and then asks this court to infer, from the expressions of a judge, used as applicable to a total failure of proof, that he would have rejected proof of the contents of lost papers; in other words, to reverse on suspicion of what would have been decided, if certain matters had been offered.

But a matter was much argued, which is totally immaterial to the cause, viz.: the third error, that the judge said the defendant was bound to know that the plaintiff was an exempt. I say totally immaterial, for, if the defendant were bound to show a regular Court of Appeals, and their proceedings, his defence fails instantly.

The legislature, on the subject of exempts, have been very explicit. As to their meaning I cannot doubt. In the act of 1816, the captain is to make two lists; one, of all persons liable to perform militia duty, and another, of persons who shall decline to be enrolled, &c.; which last are to be returned as exempts. Some disputes having arisen on the construction of the word decline, when the act of 1818 was passed, in which it is declared that they who shall omit or decline to be enrolled shall be considered as exempts, to remove all doubts, it is added, "and

[Fox v. Wood.]

every person omitting, or declining to make a choice, shall be considered as an exempt." Two rolls are to *be made [*148] out, and one to be sent to the commissioners, who are to charge each exempt four dollars in addition to his county tax.

And it is further provided, that neither the commissioners, nor any other tribunal shall exonerate such exempt; nor has he the right of appealing to any other tribunal, except the Court of Appeals of the regiment in which he resides. The county commissioners may, however, exonerate on a certificate produced to them by the exempt under the signature of the president of the Court of Appeals, and the commissioners were bound to procure such certificate to be produced, if necessary.

Why exempts were to be heard before the Court of Appeals is well known. All who omitted to procure themselves to be enrolled were set down as exempts, and their names sent to the commissioners. Some of these attended and mustered every day; and, on satisfying the Court of Appeals of this, they got a certificate, and were freed from paying the tax of four dollars. But, except for the purpose of exonerating them, the Court of Appeals had no more authority over an exempt, nor had their collector any more right to imprison an exempt, than a minister of the gospel or a judge of this court, who are totally exempted from all militia duty.

Our laws have provided for this class of citizens most carefully. There are people who speak disparagingly of those who will not bear arms. We have no right to do so, and I feel no disposition to do so. The legislature have made the law—it is our duty to enforce it. In my opinion, no officer, and no Court of Appeals, can touch an exempt without violating an express and plain law, and being a trespasser.

Although I did not agree to the decision at Chambersburg, it will, I think, be found to be the case not of an exempt, or one alleging himself to be so; but that of a man clearly within the jurisdiction of a Court of Appeals.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 2 Barr. 127; 2 J. 352; 2 G. 92.

Cited by the Court, 3 Wh. 115; 6 W. 436; 7 Barr. 271.

[*149]

*[PHILADELPHIA, JANUARY 24, 1829.]

Lee against Wright and Others.

IN ERROR.

An amendment of the declaration may be permitted on the second trial, after the reversal of a former judgment.

Where a person dies intestate leaving a debt or debts unpaid, the children of such intestate cannot maintain a suit for any part of his estate, or the proceeds thereof, against one having the property of such intestate, or holding it as their trustee; but administration must be taken out, and the debts first paid.

If a person intermeddle with the goods of an intestate, or the proceeds thereof, and act as executor *de son tort*, no administration being taken out, no trust can be raised in favour of the children as to such property, or the proceeds thereof, or any part of the same, so to enable them to sue for such property, while the creditors of the estate remain unpaid.

THIS case, which was an action brought by the defendants in error, Jane Wright and others, who were stated in the writ to be the infant children of John Wright, deceased, and who sued by their guardian, against William Lee, the plaintiff in error, had been before this court at a former term, when the judgment of the District Court was reversed, and a *venire facias de novo* awarded. See 14 Serg. & Rawle, 105.

When the trial again came on in the District Court, the plaintiffs below moved to file two additional counts to the declaration, which originally was for money had and received.

The first of these counts stated, that the defendant below was possessed of sundry goods and chattels of the value of two thousand dollars, which were by him held in trust for the sole use and benefit of the plaintiffs; and that he was bound justly and truly to administer and keep the same, and faithfully to apply them to the sole use and benefit of the plaintiffs. In consideration whereof, the defendant assumed and promised to keep, administer, and apply them as aforesaid. Nevertheless, he did not truly and faithfully administer and apply them as aforesaid, but on, &c., did apply, and convert the said goods and chattels, and the proceeds thereof, to his own use and benefit, and hath refused to make any compensation.

The second count stated, that the defendant below held a certain bond and warrant dated, &c., for two thousand dollars, the same being the consideration money for the purchase made by William Chase of the defendant, of certain goods and chattels held by the defendant, for the use and benefit of the plaintiffs. In consideration whereof, he assumed and promised to hold the bond for the exclusive use of the plaintiffs, and apply the money to their use and none other. Nevertheless, the defendant caused

[Lee v. Wright and others.]

judgment to be entered and execution to be issued, and levied on the said goods and chattels, and delivered up to the said William Chase half of the goods for the said Chase's own proper use, and not for the use of the plaintiffs, *and took possession of the other half to his own use, and hath refused to make any compensation. [*150]

The defendant objected to the filing of these additional counts; but the court permitted them to be filed, which was now assigned for error.

Several other points arising upon the record, were made in this court, and argued by *P. A. Browne*, for the plaintiff in error, and by *J. P. Norris, Jr.*, and *Rawle*, for the defendants in error, some of which will be found in the former report of this case. Those which had not been already decided, are fully stated in the opinion of the court which was delivered by

TOD, J.—As to any point already decided in this cause by our predecessors, 14 Serg. & Rawle, 105, I hold myself bound by the decision. Every exception, then taken and overruled and now repeated, is thus answered at once: And the joinder in the suit by the three plaintiffs having been then supported, is supported by us. The two new counts seem to have been very properly admitted by way of amendment. So there remains but one matter to be considered. In the court below the defendant's counsel insisted—"That where a person dies intestate, leaving personal estate and leaving a debt or debts unpaid, the children of such intestate cannot maintain a suit for any part of the same estate, or of the proceeds thereof, against one having the property of such intestate or holding as their trustee, but administration must be taken out and the debts first paid." And again, "That if a person or persons intermeddle with the goods of an intestate, or the proceeds thereof, and act as executors *de son tort*, no administration being had, no trust can be raised in favour of the children as to such property, or the proceeds thereof, or any part of the same, so as to enable them to sue for the same while the creditors of the estate remain unpaid." The court, in charging the jury, answered both these propositions in the negative, which I apprehend, was error. This point was not decided when the cause was formerly in this court. The opinion given by *Duncan, J.*, repeatedly supposes that no debts remained due. It has been argued, that in fact no debts were shown on the trial; an argument which is, perhaps, not supported by the evidence on the record. But that seems to be a matter not now for discussion. The court, in substance, directed the jury that with or without the incumbrance of debts upon the estate, the action was maintainable by the children. The hard-

[Lee v. Wright and others.]

ship of the case, which has been dwelt upon, seems to be very true. The two verdicts show it. So any other case would be a hard one of children suing in right of their father for personal property, and making out a good title in every respect except that they can show no letters of administration. But if in one case a particular hardship is to be mended at the expense of general rules, it must be so in other cases, and there will be danger of a very inconvenient practice of permitting the assets [*151] and debts of an intestate to be sued for by the *next of kin, and recovered without letters of administration. If this can be done either directly and at once, or circuitously by setting up an executor *de son tort*, under the name of a trustee, the consequence seems most certain that when anything unfair is intended, no administration will be taken out in any case. It will afford every temptation and almost impunity for embezzlement. And suppose the very best intentions in the next of kin; that alters not the case, unless we have a right to substitute their integrity in lieu of the pledges known to the law; such as oaths, inventories, and bonds with security; shackles which it is not likely any man, honest or otherwise, will take the trouble of assuming, if without that trouble they can be permitted, in the character of trustees and *cestui que trusts*, to hold all the legal powers of administration. Almost the only compulsion which our law makes use of to oblige those interested in his intestate's assets is the impossibility of suing without them. No case has been shown of an action sustained for such assets, unless by or against a lawful administrator. An executor *de son tort*, can maintain no action; 2 Com. 507. A recovery in this case cannot be pleaded against a rightful administrator, and so much of the effects as belonged to the intestate may be recovered a second time from the defendant. Vin. Ab. 222, 223, 224, 225.

As to this being a claim of equity, I apprehend that even in equity, no such action could be suffered. In *Humphrey v. Humphrey*, 3 P. Williams, 349, a bill for an account of the estate of a deceased person, though the plaintiff had, under the statute of distribution, an unquestionable right to the effects when recovered, yet, expressly because he had not administered, the Lord Chancellor rejected the bill, saying that "for aught that appears to the contrary there may be debts due." True, a creditor may administer, if nobody else will. But, I apprehend, that in nineteen cases out of twenty, a creditor will very wisely prefer to lose his debt rather than take in hand to administer on the estate of a stranger. And as to there being no danger of mischief to arise from want of a legal administrator, because whoever intermeddles is answerable to creditors as *ex-*

[Lee v. Wright and others.]

executor de son tort, it may be observed that such remedy must always be doubtful, or contentious. Besides, there is no inventory, no security; the wrongful executor may be insolvent, he may move out of the county, out of the commonwealth. Further, this court has decided in *Nass v. Vanswearingen*, 7 Serg. & Rawle, 192; that on a judgment against such wrongful executor, the lands of the intestate cannot be taken in execution, so that without administration, the remedy of creditors must be, in almost every respect, illusory. But our own statute law seems conclusive of the question. It expressly gives to the next of kin, &c., a right only to "what remaineth clear after all debts and funeral and just expenses of every sort, first allowed and deducted;" *Purd. Dig.* 372. It directs refunding bonds to be given. It enables creditors and legatees to remove even a rightful executor or administrator from his *office, unless [*152] additional security is entered; *Ib.* 614. It enacts that even letters of administration, though granted in all the forms of law, to the proper persons, by the proper officer, if without bond and sureties, shall be void and of no effect, "and the officer granting the same and his sureties, shall be *ipso facto* liable to pay all damages;" *Ib.* 611. Now can it be said, when the act of assembly is so peremptory to deny all authority to an administrator who has neglected to give security, though appointed by the proper officer, commissioned and sworn, yet that the same authority may in another way be legally assumed by whoever may think fit to assume it, without oath, or appointment, or sureties, or any responsibility, except what every trespasser incurs? Over and above the security of private rights, the public revenue is concerned. So much of that as arises from the tax on collateral inheritances, depends chiefly upon executors and administrators. They and their sureties are made responsible by the law; *Pamph. Ed.* 1826, page 227. And, by the 5th section, it is enacted, that, "In addition to the oath now required by law to be taken by executors and administrators, they shall take an oath or affirmation that he or she will diligently and faithfully regard and well and truly comply with the provisions of this act; which oath or affirmation the registers of wills for the respective counties are hereby authorized and required to administer and to place the same of record with the usual oath or affirmation." The unanimous opinion of the court is, that this judgment must be reversed.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 1 Wh. 287; 5 Wh. 354; 8 W. & S. 30; 7 Barr, 127; 4 H. 431; 1 S. 496; 10 W. N. C. 18; 13 W. N. C. 356.

Cited by the Court, 1 Penn. R. 91; 3 Penn. R. 131; 3 S. 150.

[PHILADELPHIA, JANUARY 24, 1829.]

The Farmers' and Mechanics' Bank *against* Boraef.

IN ERROR.

An entry made by a clerk in a book of a bank, of a deposit made by a customer, immediately before an entry made by him of the same deposit in the customers' bank book, and supported by the oath of the clerk, is evidence to go to the jury, together with the customer's book and the testimony of the clerk.

THE defendant in error, Henry Boraef, brought this action of assumpsit against the Farmers' and Mechanics' Bank, to recover the sum of eight hundred dollars, alleged to have been deposited by him with the bank.

On the trial, the plaintiff gave in evidence his bank book, containing an entry made by Henry Meyers, a clerk of the bank, of a deposit of eight hundred dollars, by the plaintiff, on the 7th of October, 1825. He also produced a witness, who swore to having made such a deposit on that day.

[*153] *The defendants then offered to give in evidence an entry in a book of the bank, of the deposit made by the plaintiff on the 7th of October, 1825, supported by the oath of Henry Meyers, the clerk who made it; the said entry having been made by the said clerk at the time of the deposit, and immediately before the entry made by him in the plaintiff's bank book; both entries having reference to the same deposit. The court admitted the witness, for the purpose of proving the deposit to have been made, as it appeared in the book of the bank, but rejected the book itself. The witness, however, knowing nothing but from the entry in the book, and being unable to refresh his recollection by an inspection of it, the counsel for the defendants below excepted to the opinion of the court.

Purdon, for the plaintiffs in error.—The entry in the book of the bank, supported by the oath of the clerk who made it, ought to have been admitted in evidence, though the clerk had no recollection except what he derived from the entry. It was made in the book of original entries, in the usual course of dealing between the parties, authorized by law, and was offered after the plaintiff's book had been given in evidence. The oath of a party making an entry at the time of the transaction, is always received in evidence in Pennsylvania. To exclude such evidence in a case like this, would be almost to hazard the existence of banks. The clerks, amidst the hurry of extensive business,

[The Farmers' and Mechanics' Bank v. Boraef.]

cannot possibly have any recollection of particular deposits, and the exclusion of the books would leave them altogether without evidence. The books are the only records of the transactions of banks. The apprehension that frauds may possibly be committed by clerks, is not a sufficient reason against evidence of this sort. The books of tradesmen are liable to an equal, and even a greater objection, because the books of banks check each other so completely, that it is impossible to commit a fraud unless, when the clerk makes a false entry, he puts the balance of the money into his pocket, which is scarcely practicable. There are many authorities in favour of the admission of such evidence as the court below rejected. *Patton's Administrators v. Ash*, 7 Serg. & Rawle, 124; 2 Cowen, 765; *Union Bank v. Natt*, 3 Pick. 96; *Philadelphia Bank v. Officer*, 12 Serg. & Rawle, 49; *Ridgway v. Farmers' Bank of Bucks County*, 12 Serg. & Rawle, 256. The doctrine in relation to the admission of books in evidence has latterly been extended much beyond its original limits, by following out the principle on which tradesmen's books are received. *Speer v. Saunders*, 1 Bay, 119; *Frazier v. Drayton*, 2 Nott & M'Cord, 471; *Richards v. Howard*, Id. 474; *Ingraham v. Bockius*, 9 Serg. & Rawle, 287; *Faxson v. Hollis*, 13 Mass. Rep. 427; *Owens v. Speed*, 5 Wheat. 433.

Kittera, for the defendant in error.—The evidence of the deposit claimed by the plaintiff below, was an entry in his bank book, made by the clerk of the bank, and fortified by the oath of the person who made the deposit. The defendants then offered a memorandum *book, without stating by what [*154] it was to be followed up; and the question is, whether this blotter, standing alone, was admissible in evidence. The supposed accuracy of the books of banks, and the impossibility of committing mistakes, is disproved by this case. There is no check upon an entry in the blotter, but there is on an entry in the depositor's bank book, because depositors always examine the entry immediately after it is made. The plaintiff's bank book constituted the evidence between the parties, and is conclusive unless error be proved. If the clerk had been called to prove, that instead of eight hundred dollars he had received only eighty, he might perhaps have been admitted; but he was not called to impeach the entry in the bank book, but to prove that he had made an entry of a different amount in another book. The bank ought to have shown, and they might easily have done so, what were their receipts on the day on which the deposit was made.

The opinion of the court was delivered by

[The Farmers' and Mechanics' Bank v. Boraef.]

TOD, J.—Boraef, the plaintiff below, sued the bank in assumpsit for money had and received, and on the trial produced his bank book, showing a deposit of eight hundred dollars, made on the 7th of October, 1825. He also produced a witness, who swore that he, the witness, made that identical deposit for the plaintiff on that day.

The defence was, that the money deposited was in fact eighty dollars, and that the figures "800" had been set down in Boraef's book by mistake, instead of "80," by Henry Meyers, a clerk in the bank, who received the deposit. To support this defence, Meyers himself was offered as a witness. A book belonging to the bank was also offered, in which, as was said, he, Meyers, had at the time of the deposit entered it as of eighty dollars, previous to his entry in the book of the plaintiff. Boraef, the plaintiff, did not object to Meyers as a witness; but he objected to the book showing the entry of eighty dollars. The court rejected the book. Meyers, without it, could not undertake to swear at all.

In deciding the question whether this rejection was error, the cases cited to show how far the books of a corporation are evidence in dispute with their customers, appear to have no very strong application. If the book belonging to Boraef, the plaintiff, had been lost or withheld, no doubt the bank entries might be *prima facie* sufficient.

If the bank relied on its own book, not only as the original entry, but as superior and controlling and correcting the book of Boraef, it asked too much; for the main evidence of the contract was the document delivered to Boraef. He could not oversee the bank books, nor had he any business to examine them. He never intended to rely upon their entries, but held in his own hand his own voucher equal to a receipt. Therefore the book offered by the bank would have been a sort of evidence [*155] quite inconclusive, as I *take it, and worth very little, if unsupported; yet it by no means follows, that it was not evidence at all. A mistake was alleged, and it appears that a mistake, somewhere, existed. The bank might have had other evidence. The book ought to have gone with the plaintiff's book, and with Meyers' testimony, to the jury, as containing one of the entries made by him at the time, with his explanations, if he had any to offer.

The opinion of the court in *Henderson v. Jones*, 10 Serg. & Rawle, 322, cites many cases where the previous declarations of a witness have been held to be evidence to support his testimony. It is assumed that Meyers was able to swear, if permitted, that his entry in the bank book was true, to the best of his knowl-

[The Farmers' and Mechanics' Bank v. Boraef.]

edge and belief: otherwise, most clearly, the book is not evidence for any purpose.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 12 H. 359; 1G. 337; 4 Wr. 203; 10 W. N. C. 446.
Followed 1 C. 292.

[PHILADELPHIA, JANUARY 24, 1829.]

Streaper *against* Fisher and Others.

IN ERROR.

The purchaser at a sheriff's sale, of a ground rent, may maintain an action of covenant for the rent against the owner of the ground out of which it issues.

Generally, the levy on real estate will control all the subsequent proceedings. Therefore, if the levy be upon a rent charge and the *venditioni exponas, alias venditioni exponas*, &c., command the sheriff to sell the rent charge, but he advertise the lot upon which it is charged, and make a deed to the purchaser, purporting to convey the lot, and no application be made to set aside the sale at the proper time, by those authorized to object to it, the rent charge passes to the purchaser.

The pendency of an ejectment for a lot of ground out of which a rent charge issues, brought by the executors of a testator, will not prevent a recovery in an action of covenant, for the rent, by his devisees.

ON the return of a writ of error to the District Court for the city and county of *Philadelphia*, it appeared from the record, that this was an action of covenant brought by Redwood Fisher and others, devisees of Miers Fisher, deceased, who sued as assignees of Charles Hurst, to recover three years' arrears of ground rent, reserved in a deed dated the 9th of March, 1785, executed by the said Charles Hurst to Charles W. Peale, under whom the defendant below, Richard Streaper, derived title to the lot of ground out of which the ground rent issued.

On the trial in the District Court, the jury by agreement of the parties, found a verdict for the plaintiffs for one hundred and seventy-two dollars and fifty-four cents, subject to the opinion of the court upon the facts specially found by the jury. In substance they were as follows:—

*On the 9th of March, 1785, Charles Hurst conveyed [*156] to Charles W. Peale a lot of ground in the city of Philadelphia, particularly describing it, subject to the yearly rent or sum of fifty-three dollars thirty-three cents, payable annually on the 9th of March, forever; and Peale covenanted to pay the said rent. At July Term, 1787, the executors of William Brownjohn obtained a judgment against Charles Hurst, on which several executions issued, and parts of the estate of Charles Hurst were sold. On an *alias fieri facias pro residuo*,

[Streaper v. Fisher and others.]

a levy was made, among other things, on No. 20, (the items levied upon having been numbered in consequence of being numerous,) "One yearly rent charge of fifty-three dollars and thirty-three cents, issuing and payable out of a lot, (describing it exactly,) in the possession of C. W. Peale." Several writs of *venditioni exponas* issued, upon one of which the property was struck off to Timothy Hurst; but the sale was set aside. A *pluries venditioni exponas* issued to March Term, 1799, commanding the sheriff to sell *inter alia*, No. 20, "One yearly rent charge," &c., describing it, as in the levy. To this writ the sheriff returned, that he had sold the lot No. 20, out of which the rent issued, to Anthony Morris and Miers Fisher, for five hundred dollars. On the 26th of March, 1799, the sheriff made a deed to the said Anthony Morris and Miers Fisher, in which he recited the *feri facias*, the levy and the several writs of *venditioni exponas*, and then proceeded to state, that in pursuance of the writ of *pluries venditioni exponas*, he had sold to Anthony Morris and Miers Fisher, a lot of ground and stable thereon, No. 20, containing twenty feet in breadth, on the west side of Third Street. He then conveyed to them the said lot, (describing it particularly,) "together with all and singular the rights, liberties, privileges, hereditaments, and appurtenances whatsoever, to the said hereby granted premises belonging, and the reversions and remainders, rents, issues, and profits thereof."

Anthony Morris afterwards conveyed his share to Miers Fisher.

On the 7th of October, 1808, Charles W. Peale sold the lot to John Cameron, subject to the ground rent. On the 30th of September, 1811, Cameron sold it to William H. Smith, subject to the ground rent; and on the 13th of February, 1817, Smith sold it to Richard Streaper, the defendant below, subject to the said ground rent of fifty-three dollars and thirty-three cents, payable to Charles Hurst, his heirs and assigns.

Two letters from Miers Fisher to Charles W. Peale, dated in 1812 and 1813, were produced, in which he stated that the property had been advertised as a lot, &c., and not as a ground rent issuing out of a lot; and that he had purchased, supposing he was buying the lot itself, and not the rent charge. He then settled with the tenants for the rent in arrear, and received the rents from that time until his death in 1819. After his death, the defendant, who had until that period paid the rent, being induced to doubt Fisher's title to it, refused to make further [*157] payments. In the year 1823, the executors *of Miers Fisher, under a clause in his will empowering them to sell if necessary, brought an ejectment to recover the

[Streaper v. Fisher and others.]

lot, or to enforce payment of the rent. To November Term, 1824, while the ejectment was pending, the plaintiffs, to whom this property was devised by Miers Fisher, brought this action.

Upon the facts thus found by the jury, the District Court gave judgment for the plaintiffs below; upon which the defendant's counsel excepted to their opinion, and removed the cause by writ of error to this court.

J. R. Hopkins, for the plaintiff in error, contended, that by virtue of the sheriff's deed of the 26th of March, 1799, the purchaser acquired no title, either to the ground rent or to the lot upon which it was charged. The sale was illegal and void; 1. Because there was no levy upon the property sold, and the sheriff cannot sell what he has not levied upon. 4 Yeates, 114; 2 Binn. 80, 92.

2. Because no inquisition was held, under the act of assembly, to ascertain whether the rents, issues, and profits would pay the debt in seven years. Act of 1705, sect. 2; 1 Sm. L. 57.

3. Because the sheriff does not appear to have had any authority to sell what he did sell. By the *renditioni exponas*, he was commanded to sell the rent charge; instead of which he advertised and sold the ground out of which it issued, for which alone the deed was made. It was never supposed by the purchasers that the ground rent passed by this deed. They always considered themselves as having purchased the lot. If they acquired no title to the land, either in consequence of irregularity in the proceedings or because it had been sold to Peale, before Brownjohn's judgment was obtained, it was their misfortune. Like all other purchasers at sheriff's sale, they come within the operation of the rule of *caveat emptor*; *Freedly v. Sheets*, 9 Serg. & Rawle, 156. There is nothing in the deed descriptive of the rent charge, and consequently it did not pass. If there be error in the description of the thing intended to be granted, nothing will pass. 1 Com. Dig. Fait. 286, note. In a sheriff's deed nothing passes under the general clause. 13 Johns. Rep. 537, 551. It is void for uncertainty. *Id.* 97. Under the general grant, therefore, of all the rights, liberties, &c., the rent did not pass. It would not, under such a description, in any deed; and still less in a sheriff's deed, under which the purchaser takes nothing, but what is fully and accurately described.

The plaintiff's claim is founded upon a covenant supposed to run with the land. An assignee is undoubtedly bound by a covenant which runs with the land; but for this purpose, there must be privity of estate between the parties. 1 H. Bl. Rep.

[Streaper v. Fisher and others.]

562; 3 Salk. 4. In this case there was no privity of estate. The plaintiff's testator was never seised of the rent. He never even claimed it until the year 1812, although the sheriff's deed bore date in 1799. If it be said that the defendant below recognized his title by paying him the rent, the answer is, that [*158] he was misled by Mr. Fisher's declaration *that he was the assignee of Charles Hurst, and that his title had been confirmed by the court. The payments were made under a misapprehension of the facts, and therefore cannot affect him. Phill. Ev. 479, 480. Payment of rent is evidence of seisin, only where the party receiving it has a right of entry. 4 Davis's Abt. 29. Privity of interest, and not the payment of rent, is the true test of who is the landlord. Coleman's Cases, 50.

The defendants in error have an ejectment pending for the lot itself, and, therefore, cannot support this action of covenant for the rent charged upon the lot. The parties to both these suits are the same; for although in the ejectment the executors of Miers Fisher are plaintiffs, they are by his will the trustees of the devisees. A man cannot have two writs for the same cause of action at the same time. 1 Bac. Ab. 25. The second must abate. Id. 22. This suit, therefore, having been instituted after the ejectment, cannot be supported.

Dwight and T. Sergeant, (with whom was *Price*), for the defendants in error.—In the decision of this case, two questions are involved. 1st. Can a purchaser at sheriff's sale, to whom a ground rent has been conveyed by the sheriff's deed, maintain an action of covenant against the assignee of the land out of which the rent issues?

2d. Was Miers Fisher such a purchaser; or, in other words, did he acquire a title to the ground rent in question by virtue of the levy; *venditioni exponas*, sale, and sheriff's deed?

1st. The deed from Hurst to Peale contains a covenant between the grantor, his heirs and assigns, and the grantee, his heirs and assigns, for the payment of the rent by the latter to the former. A purchaser at sheriff's sale is an assignee in law, and becomes a party to the covenant. By the law of Pennsylvania, such a purchaser becomes invested with all the legal rights of the defendant in the execution, discharged of all secret trusts. *Smith v. Painter*, 5 Serg. & Rawle, 223. If the debt be paid before execution, the purchaser's title is not affected by that circumstance. *Samms v. Alexander*, 3 Yeates, 268. An assignee by act of law has the benefit of all covenants express or implied, which run with the land, though such assignee be not

[Streaper v. Fisher and others.]

named; and a covenant to pay rent runs with the land. Shep. Touch. Ch. 7, p. 572, 574; 5 Coke, 17; Appowel v. Monnoux, Moore's Rep. case 241, p. 97; Hurst v. Lithgrov, 2 Yeates, 25.

2d. In determining whether Fisher was an assignee of the rent, his character is to be regarded, first at law, and secondly in equity.

1. At law. The first step in his title was a *feri faciās*, levied upon the ground rent in question. The second, a *renditioni exponas* for the sale of the same ground rent. The third, an *alias renditioni exponas*, having the same object; and the fourth, a *pluries renditioni exponas*, commanding the sheriff to sell the *rent; under which he sold the lot [*159] by the same description as was contained in the levy. That his official intention was to sell the rent charge, is deducible from the authority under which he acted. He recites the levy and all the proceedings in relation to the rent, and declares that he sold in pursuance of them; and though the deed describes the lot, yet it must be taken in connection with the proceedings upon which it was founded, and be considered as a conveyance of the thing intended to be sold. The whole of the proceedings constitute one conveyance. But the instrument itself contains enough to pass the rent. It conveys lot No. 20, with all the rents, &c. The conveyance of the land, embraces all minor interests in it. The settled rules relative to the construction of deeds, will serve as guides to a decision of this case. A deed, and particularly a deed poll, must be construed most strongly against the grantor; and if it cannot operate in the manner intended by the parties, it will be construed so that it shall operate in some other manner. Spencer, C. J., in Jackson v. Blodget, 16 Johns. 178; Shep. Touch. 82, 83; Co. Litt. 302. A deed shall be so interpreted, that it shall, if possible, take effect, *ut res magis valeat quam pereat*. Co. Litt. 183, 186; 2 Saund. 96, b, note 1. A deed is never void, if by any construction it can be made good. Thus a grant at common law, or a bargain and sale, may operate as a covenant to stand seized. A feoffment will operate in the same manner. Where the words of a deed may be applied to any intent, it shall not be void. Shep. Touch. Ch. 5, sect. 2; Exposition of Deeds, Plowd. 160. Another rule is, that where a man grants more than he has, all that he has shall pass. Shep. Touch. Ch. 3, sect. 2, rule 58. If these rules be applied to the facts of the case, the sale will be found good. Where there is enough in a deed to designate what is meant to be conveyed, the addition of circumstances, false or mistaken, will not vitiate it. Jackson v. Clark, 7 Johns. 217, 224. The case of Jackson v. Loomis, 18 Johns. 81, in which

[Streaper v. Fisher and others.]

the words "Lot No. 51," were rejected as surplusage, closely resembles this, in which the mistake was, the omission to insert the words "ground rent issuing out of," the lot which was properly described.

The words of the instrument in themselves pass the rent. If A. grants all his lands and tenements in D., and has nothing there but a rent charge, that will pass. 2 Roll. Ab. 57; Grant: T. 6. A. devises to B. all his lands in D. and has nothing there but tithes; the tithes pass. 1 Roll. Ab. 164; Devise, N. 4. It is settled in Pennsylvania, that the term "land" includes every secondary and derivative interest connected with it, such as a rent charge. *Shaupe v. Shaupe*, 12 Serg. & Rawle, 12. If a sheriff's deed purport to convey a fee, and the defendant had only an estate for life, that passes. 1 Cowden's Rep. 470. So if it purport to convey a share of a joint-tenant greater than he had, what he had will pass. 14 Mass. Rep. 404; 4 Yeates, 111.

2. As to equity. The levy and writs were the power under [*160] *which the sheriff acted. The deed was the formal execution of that power; which having been defectively performed, equity will aid it. Madd. Ch. 47; Sugden on Vend. 523. The purchasers having paid a valuable consideration, a court of equity would correct the mistake in the conveyance; for the consideration is the substance of the conveyance, and all the rest mere form. Powel on Powers, 161, 163, 165. The debtor has received all the benefit of the sale; has assented to the transfer of his interest; the purchase-money has gone to pay his debts; he has never moved to set aside the sale, and it cannot now be disturbed. A sheriff's sale of land on a judgment against an executor *de son tort*, is void, yet those who stand by and encourage it, are bound by it. *Nass v. Vanswearingen*, 10 Serg. & Rawle, 144. So if property be not included in a levy, if the debtor represent it as included, the purchaser will hold it. *Buchanan v. Moore*, 13 Serg. & Rawle, 304, 306. If a party having title stand by and see the property sold as another's, he cannot afterwards set up his own title. *Covert v. Irwin*, 3 Serg. & Rawle, 283. Hurst, therefore, and all those who claim under him, are conclusively estopped to deny the plaintiff's title. Even if the mistake could have been corrected before the acknowledgment of the sheriff's deed, it is too late now, after the lapse of twenty years, which cures all irregularities in judicial proceedings. *Thompson v. Skinner*, 7 Johns. Rep. 556.

As to the objection founded upon the pendency of the ejectment for the lot itself, it is answered by saying, that it is not between the parties to this suit. The executors of Miers Fisher, and not his devisees, are the plaintiffs. If, too, there be any

[Streaper v. Fisher and others.]

thing in the objection, it should have been pleaded in abatement. 1 Chitty Pl. 443; Percival v. Hicky, 18 Johns. 257. Besides, it is only one of three concurrent remedies, distress, covenant, and re-entry. Bantleon v. Smith, 2 Binn. 146, 153; Chipman v. Martin, 13 Johns. 244.

P. A. Browne, in reply.—A stranger cannot sue on a covenant in a deed. To support an action, the plaintiff must be a party to the instrument, unless he be an assignee suing upon a covenant running with the land. But he must, in that case, be an assignee in the legal acceptation of the term. Even where a party comes in by act of law, he is not necessarily such an assignee. 2 Bac. Ab. 75, Covt. E. The rules of construction relied upon in the opposite argument do not apply to a case like this. They refer entirely to sales between parties, and do not apply to judicial sales. The reason of the rule that deeds are to be taken most strongly against the grantor, does not exist as to the deed of a sheriff. He has no interest in the property, and no motive to look into those matters which concern other grantors. Is it to be construed most strongly against the debtor? The policy of Pennsylvania has been to protect the debtor; hence the extension of the property, if the rents, issues, and profits, will pay in seven years; hence personal property must be taken into execution before real, and the mansion house sold last.

*The rule that if a deed cannot operate in one way [*161] it shall in another, is likewise confined to deeds between parties. A sheriff's deed cannot operate as a release or confirmation. He can sell only in the manner prescribed by law, and his deed can operate only as a grant, because the law only gives him power to grant. The cases cited against us are not in point. In that in 18 Johns. 81, there was a mistake in calling the property No. 51, instead of No. 50; but the description was so perfect without the number, that there could be no uncertainty about it. No one was or could be taken by surprise. The case in 14 Mass. R. 404, was decided on the principle, that no one could be injured by sustaining the sale. Besides, the description was full and correct, and though the deed could not operate to pass the whole estate it purported to pass, yet it was held to operate to the extent of the estate the party had.

The pendency of the ejectment is a fatal obstacle to the plaintiffs' recovery. A party cannot claim in inconsistent rights. He cannot claim both the rent and the land. It is not the case of concurrent remedies for the same thing; but of inconsistent and contradictory claims, which cannot subsist together. It was not necessary to take advantage of this objection by a plea in abate-

[Streaper v. Fisher and others.]

ment. It may be pleaded either in bar or in abatement. 5 Bac. Ab. 439, Pleas and Pleading.

HUSTON, J., (after stating the facts,) delivered the opinion of the court.

Several objections taken to the plaintiffs' recovery were very properly passed over by their concluding counsel.

The statute 32 Hen. 8, is reported by the judges to extend to this state, and, in fact, has been always in use here. Soon after its passage a construction was put on it which has not been varied. Collateral covenants, such as do not relate to or depend on the land demised, are not within it; but covenants, which touch or relate to the land demised, run with the land, and bind the assignee, and the assignee of an assignee, the assignee of an executor, or heir or devisee, or whoever is terretenant of the land under the demise, whether coming in by assignment or act of law; and the lessor, and all claiming under or through him, are equally bound, and equally entitled with the lessee, and those claiming under or through him. He to whom a lease for years is sold, is within it. 5 Co. 162, (the whole of that case); Shep. Touch. Ch. 7, 176, 179. And the only difference in the liabilities of the original parties, and those coming after them, is, that covenant lies generally against the original party after his interest is parted with; assignees are generally answerable for breaches within their own time; and when the books say no stranger can take advantage of a covenant, if by covenant is meant a covenant real respecting land, or leases, it is to be understood that whoever is privy in contract or in tenure, is not a stranger. A stranger is one who claims under another title, adverse or paramount.

[*162] *Another objection is made, on account of the difference between the levy and the deed. This difference is as to the interest of C. Hurst in the lot; not as to the description of the lot, in which that interest is. The lot is well described; but the levy is on a rent charge, though the deed conveys the land itself, or purports to convey it.

What passes by a deed from the grantor to a grantee has been often discussed, and, it would seem, ought to be considered settled. Courts will not, if it can be avoided, suffer a deed to be inoperative, when fairly made, and on good and legal consideration; and, if the form used will not operate as the parties intended, it shall have effect in some other way, if possible. Thus a deed intended as a release, may take effect as a grant of a reversion, an attornment, or a surrender *et converso*. Shepherd's Chap. of Exposition of Deeds, and 2 Saunders, 94. Indeed, it has been very properly conceded, that if Charles

[*Streaper v. Fisher and others.*]

Hurst, after selling to Peale, reserving this rent charge and a right of entry to enforce it, had afterwards sold a second time, all that Hurst could sell, viz., the rent charge and right of entry, would have passed. But it is contended, that such is not the effect of a judicial sale on execution.

A rent charge, or any other legal or equitable interest in lands, may in this state be sold on execution. 1 Yeates, 429; *Shaupe v. Shaupe*, 12 Serg. & Rawle, 12. Generally, the levy will control all the subsequent proceedings; it is the foundation on which all is built. There may be difficulty, where the sale is more extensive than the levy, if the objection is by the purchaser, and in proper time; for he may be affected. So there may be an objection by the defendant in the execution, if the advertisement does not conform to the levy; but, if the plaintiff and defendant in the execution, and all judgment creditors acquiesce, if the purchaser does not object, on what principle can a third person be heard at the end of thirty years, or why does he complain of an irregularity, which does not, and cannot affect him? The rent charge is due. The heirs of Hurst do not, and could not now claim it. But on principle, and on authority, the sale was good from the time the deed was made and accepted. Before, or, under some circumstances, shortly after, the defendant or the purchaser might have objected. After payment of the money, and acquiescence, neither could. Where the sale purports to convey the whole interest of the defendant in the execution, any and every interest he has will pass; at least, where it is not greater than described; and even if greater, and the defendant knew of the sale and did not take exception, and have his interest properly described. So in other states. 1 Conn. Rep. 470; 14 Mass. Rep. 404.

The whole interest of Charles Hurst passed by this sale and deed, and the plaintiffs below are in law assignees of Charles Hurst, and can support this suit.

There is nothing in the objection of another suit pending. It is not by the same parties; nor, so far as we see, for the same object.

Judgment affirmed.

Cited by Counsel, 3 Penn. R. 462; 5 W. 475; 7 W. 55; 2 W. & S. 311; 3 W. & S. 322; 7 W. & S. 294; 2 Barr, 168; 3 Barr, 65; 2 J. 285; 4 H. 103; 11 H. 163; 3 Wr. 40; 9 Wr. 479; 4 S. 303, 343; 11 S. 101; 21 S. 63; 11 W. N. C. 101.

Cited by the Court, 1 R. 329; 1 Wh. 351; 2 W. & S. 127; 10 Barr, 284; 2 H. 28; 2 Par. 163.

In Pennsylvania, the assignment of a ground rent carries with it the right to all remedies that existed between the original parties: *Juvenal v. Patterson*, 10 Barr, 282. Distress is not an incident of Pennsylvania ground rents: *Wallace v. Harmstead*, 8 Wr. 492: but see *Kenege v. Elliott*, 9 W. 258. Nor can the ground rent be enforced by an ejectment: *Kenege v. Elliott*, 9 W. 258.

[Streaper v. Fisher and others.]

Covenant, however, will lie and that without a previous demand: *Royer v. Ake*, 3 P. & W. 461; and it matters not that plaintiff is the assignee of but an undivided portion of the rent: *Cook v. Brightly*, 10 Wr. 439; or that defendant is the assignee of but part of the land: *Weidner v. Foster*, 2 P. & W. 23. In *Maule v. Weaver*, 7 Barr, 329, and *Irish v. Johnston*, 1 J. 488, it was decided that a grantee under a deed poll could not be sued in covenant. This would seem to have overruled the law of *Weidner v. Foster*. In *Hannen v. Ewalt*, 6 H. 9, these later cases were overruled, and the right to sue in covenant assignees of ground rent under a deed poll re-established. An Act of Assembly had been just passed giving this right, (Act April 25th, 1850,) but this decision was made without referring to the Act. Under this Act it has been held that the sheriff's vendee is liable in covenant. *Smith v. Conrad*, 11 W. N. C. 100. The Act June 12th, 1878, has again changed the law, and an assignee of land subject to a ground rent is no longer personally liable for the rent unless he has expressly assumed it. This Act has no retroactive force. *Miller v. Kern*, 7 W. N. C. 504 (C. P., where all the cases are discussed); *Smith v. Conrad*, *supra*.

[*163]

*[PHILADELPHIA, JANUARY 24, 1829.]

Adlum *against* Yard.

IN ERROR.

If, on the trial of a *scire facias* against a garnishee in a foreign attachment, the plaintiff read the answers of the defendant to the interrogatories exhibited to him on the part of the plaintiff, he may, notwithstanding, contradict those answers, by showing that the defendant swore differently on another occasion.

Though an assignment be in its nature calculated to delay creditors, and therefore avoidable, yet, if a creditor take a dividend under it, he cannot afterwards question its validity.

The lapse of seventeen years, without corroborating circumstances, is too short a time to raise a legal presumption, that the objects for which an assignment was made for the benefit of creditors, had either been accomplished or abandoned.

ERROR to the District Court for the city and county of *Philadelphia*, in a *scire facias* against the defendant in error as garnishee in a foreign attachment.

A writ of foreign attachment, at the suit of John Adlum, the plaintiff in error, against Edward Stevens, was issued, and laid in the hands of James Yard, the defendant in error.

After judgment had been entered in the attachment, a *scire facias* was issued against Yard, as garnishee, and several sets of interrogatories filed in succession, to all of which he gave answers upon oath.

When the trial came on in the District Court, his answers were read by the plaintiff's counsel, who afterwards offered to read the final examination of Yard, before commissioners of

[Adlum v. Yard.]

bankruptcy, under a commission which issued against him in the year 1802; in order to show a contradiction between what he then swore and his present answers. The court rejected the evidence.

The defendant then gave in evidence, a general assignment made by Stevens, of his estate and effects, on the 17th of May, 1802, to trustees, for the benefit of his creditors, in the following words:—

“Know all men by these presents,—that whereas I, Edward Stevens, of Philadelphia county, being indebted to sundry persons, in divers sums of money, which at present I am unable fully to pay and discharge, and being desirous, as far as lies in my power, to satisfy the persons to whom I am indebted, I do hereby grant, bargain, sell, assign, and set over, to Samuel M. Fox, Matthias Pierce, and Anthony Morris, all my estate, goods, chattels, debts, and property, as well real as personal, of which the schedule hereunto annexed contains a fair and true account, to them the said S. M. Fox, M. Pierce, and Anthony Morris, their heirs, executors, administrators, and assigns forever, upon the condition following, viz.: That all moneys which shall arise from the estate, goods, chattels, debts, and property aforesaid, shall be equally divided, in proportion to their respective demands, among my said creditors. But * that [*164] the lands mentioned in the schedule shall not be sold, until after the expiration of three years from this date, after which it shall and may be lawful, to and for the said S. M. Fox, M. Pierce, and Anthony Morris, to make sale of the said lands, or so much of them as shall be sufficient to pay and discharge what may then be due and owing from me to my said creditors. And, in case the estate and effects of James Yard shall, before the expiration of the said term of three years, prove sufficient to discharge the whole of his debts for which I am responsible, then the above mentioned estate, goods, debts, chattels, and property, or so much thereof as shall at that time remain undivided, shall be restored to me, in the same manner as I now hold them. Witness my hand and seal the 16th of May, 1802.

(Signed)

“EDWARD STEVENS. (L. S.)

“Sealed and delivered in presence of

“JAMES LATIMER,

“JAMES A. WOOD.”

“List of the debts of Edward Stevens, by his indorsements for James Yard:—

[*Adlum v. Yard.*]

Pratt, Son & Kintzing, secured by mortgage, \$33,836 64

William Read & Co, 32,015 36

Bank of United States, on seven notes, . . 17,400

Bank of North America, on seven ditto, . . 10,000

Bank of Pennsylvania, on two ditto, . . . 4,850

Donath & Co., on five ditto, 22,127

86,392 36

Stephen Girard, 6,000

\$92,392 36

"Besides the above debts, I have unsettled accounts with Thomas Knox, William Gordon, Monsieur de Rette, and James Yard, but do not know at present on which side the balance lies. I am, however, confident that it cannot be considerable either for or against me. (Signed) "EDWARD STEVENS."

"Schedule of the property and effects of Edward Stevens:—

Debt from the United States, \$20,000

Lot in Chestnut Street, 3,333

Interest in ship Asia and brig Dolly, 15,000

Lands bought of John Adlum, subject to incumbrances, as stated, 20,000

Household furniture, professional and other books.

One-sixth of 217,000 acres of land on the West Branch of the River Susquehannah, being

[*165] *half of the third part of the said tract conveyed by George Eddy and Esther his wife, to Edward Stevens, by indenture, dated the 11th February, 1795, \$27,000

"N. B.—The last mentioned land is really the property of Mrs. Stevens: but, as doubts have arisen whether the proofs thereof are conclusive, I do hereby declare, that I assign and set over to the assignees of my other effects, all the right, title, claim, interest, and demand, which it shall be proven that I have in and to the said land, to hold on the conditions mentioned in the foregoing assignment.

"The remaining one-sixth part of the land is the property of Ernest Frederick Walterstorff, of Copenhagen, Denmark, of which the proofs are full and conclusive.

(Signed)

"EDWARD STEVENS."

"Recorded Feb. 21, 1803."

[Adlum v. Yard.]

The defendant also gave in evidence payments made by the assignees to the creditors of Stevens, during the year 1804, amounting to \$23,000, and produced the receipts of Adlum for money paid to him by the assignees to the amount of \$6,222. Evidence of other facts was also given on the trial, which it is at present unnecessary to notice.

The plaintiff's counsel proved the payment of taxes, by Yard, on part of the lands included in the assignment; and contended, that the assignment was in itself void, or, if not so, that from the length of time that had elapsed without anything having been done under it, the object of the trust must be presumed to have been either accomplished or abandoned.

The court charged the jury in favour of the defendant, and a bill of exceptions was taken, as well to the overruling of the evidence, as to the charge to the jury.

Chew and *Rawle*, for the plaintiff in error, contended, that the examination of Yard before the commissioners of bankruptcy ought to have been admitted. It was offered, to show that Yard was not entitled to certain credits, asserted in his answers to be due to him for advances made by him before his bankruptcy. It was objected to by the defendant's counsel; the court sustained the objection, and declared that no evidence should be given to the jury to contradict the answers of the garnishee.

The propriety of this decision may in some measure depend on the character in which the garnishee is to be viewed.

If merely as a witness at common law, the rule is well settled, that he who calls a witness shall not be admitted afterwards to impeach his general character; but it goes no further. If the witness is mistaken as to a fact, it is competent for him who calls him to correct the mistake by means of another. But a garnishee in a foreign attachment stands on different grounds. He is not so much *a witness as a defendant answering to a bill of discovery and relief; as to whom the rule [*166] is, that the whole of his answer must indeed be read, but it is not all to be alike believed. 1 Phill. Ev. 360. Till the act of the 28th of September, 1789, the process of foreign attachment often proved fruitless from the difficulty of proving effects in the hands of the garnishee. By that act, he was justly placed on the footing of a mere stakeholder. By that act, he is required to give, on oath or affirmation, "full, direct, and true answers to all and singular the interrogatories exhibited on the part of the plaintiff." If the plaintiff is satisfied that his answers are "full, direct, and true," he may take judgment for what is so acknowledged to be in his hands without a trial. If

[*Adlum v. Yard.*]

his answers are otherwise than full, direct, and true, the act proceeds to say, that the court may award judgment against him for the whole of the plaintiff's demand. But how is it to be ascertained whether the answers are or are not full, direct, and true, except by counter evidence? The answers must first be read, or it cannot be decided whether they are such as the law requires. So that, instead of the plaintiff's being estopped by reading them, it is the very course that he must take. The next step is, to ascertain what may be the nature of that counter evidence. Must it be the testimony of other witnesses, or may we falsify the answers in part or in whole by showing the contrary of what is now asserted, from the garnishee's own acknowledgments or acts on another occasion? But, according to the view taken by the court below, we are precluded from showing in any way that the answers are not what they ought to be; and, if this be law, any answers of a garnishee must be received as full, direct, and true. There has been as yet no decision in this court on the construction of the act of assembly of 1789; not at least as to this point; but the case of *Cowden v. Reynolds*, 12 Serg. & Rawle, 281, is strongly apposite. They also cited *Walker v. Wallace*, 2 Dall. 113.

2. The assignment executed by Stevens in 1802, was in itself void; and, whether void or not, it has been abandoned for many years by the trustees, who never paid the taxes on the lands, nor participated in the claims on government for compensation under the Spanish treaty, or called on Yard for reimbursement of the sums they were asserted to have paid out of Stevens' funds for his account, nor intervened on the present trial. It is the defendant who sets up this dormant, deserted trust.

The defects on the face of the instrument itself show that, as against creditors, it is fraudulent and void. The trustees, in whom the legal estate is intended to be vested, are not to sell for three years. A creditor obtaining judgment is then to be delayed for three years, without the power of laying an execution on the lands. There is a direct resulting trust in favour of Stevens, if the creditors on account of Yard are satisfied, whether the others are or not. This brings it within the case [*167] of *Burd v. Fitzsimmons*, as explained *by Chief Justice Tilghman, in *Wilt v. Franklin*, 1 Binn. 515. If it is fraudulent, it is void; and that which is void, can be set up by no supposed act of confirmation. 1 Inst. 295; 3 Burr. 1794; 4 Cruise, 105. Adlum's receipt of moneys from the trustees did not bind him. That he knew of the assignment, is obvious from the language used, though it does not appear that he knew the contents of it. The payment of taxes by the assignor, or his agent, is a strong argument in favour of the extinction of

[Adlum v. Yard.]

the trust. 4 Johns. 586 ; 10 Serg. & Rawle, 427 ; 14 Johns. 464 ; 20 Johns. 447.

Binney and Chauncey, for the defendant in error.—1. In refusing to permit Mr. Yard's final examination before the commissioners of bankruptcy to be read in evidence, the District Court was right. It was offered in order to prove that he was not entitled to certain credits stated to be due to him, for advances made before his bankruptcy for Dr. Stevens. The evidence was liable to objection, 1st. Because it was irrelevant. No such credits were stated to be due to Yard. They are stated argumentatively to be due to his assignees, and whether the fact be so or not, is immaterial. 2dly. Because it is not competent to the plaintiff to overthrow the answer of Mr. Yard, by discrediting him.

The question is new and of great interest. The plaintiff had examined Mr. Yard three times under oath ; he had read his answers to the jury and neither produced nor offered to produce, any other evidence in support of his case. But he offered, from Mr. Yard's former declarations, to contradict and thus to discredit him. No principle has been stated, or authority produced, to sanction such a course. The case of *Walker v. Wallace*, 2 Dall. 113, is not to the purpose. It was a question of costs, and it did not appear that the answers were read on the trial. The answers of Mr. Yard may be regarded, 1. As those of the plaintiff's own witness. 2. As the answer of a defendant in chancery. 3. Under the act of assembly.

1. Mr. Yard is to be regarded as the plaintiff's witness, and not as a mere party. He is presumed to stand perfectly neutral, and his answers operate against the defendant in the attachment, for which purpose they were read. A party cannot contradict his own witness by showing that he made a different statement at a different time, because it directly discredits him, which cannot be done. If a party's own witness unexpectedly states a fact which operates against him, he may call a witness to prove that the fact was otherwise. Beyond this he cannot go. 1 Phill. 20, 211, 212 ; Bull. N. P. 297. In the case of *Nicoll v. Conard*, recently decided in the Circuit Court of the United States for this District, Judge Washington expressly overruled the evidence offered by the plaintiff to show that witnesses called by them and stating certain facts on their cross-examination, had stated them differently on other occasions. The plaintiff was not bound to read the answers of the garnishees ; but having chosen to read them, he read them as truth. They could be no surprise upon him, as he was previously ac-

[*Adlum v. Yard.*]

[*168] acquainted *with their contents. In *Alexander v. Gibson*, 2 Campb. 556, Lord Ellenborough said, that a party is not to set up so much of a witness's testimony as makes for him, and reject or disprove such part as is of a contrary tendency; but if a witness is called and gives evidence against the party calling him, he may be contradicted by other witnesses on the same side, and in this manner his evidence may be entirely repudiated. 2. If the answers of the garnishee are to be regarded in the light of an answer in chancery, it was not competent to the plaintiff to reject any part of them by the evidence offered. It is a fundamental rule that the whole of an answer must be taken, if it be taken at all, and that part cannot be taken and part rejected. 1 Phill. Ev. 264; *Lynch v. Clark*, 3 Salk, 154; Bull. N. P. 237; 1 Starkie on Evidence, 291. It is utterly against the rule of reason to permit a party to discredit the defendant, or to reject a part of his answer by showing that he stated otherwise at another time. The course attempted to be adopted on the other side, is an attempt to reject the answers, not by disproving facts by other competent evidence, but by raising a question about the party's credibility. 7 Johns. Ch. R. 217.

3. Under the act of assembly of the 28th of September, 1789, sec. 3, the garnishee is bound to exhibit full, direct, and true answers. If the plaintiff thinks he has not done so, he may apply to the judges for judgment that he has assets to pay. If he omits to do this, but goes to trial and uses the answers on the hearing, he admits them to be full, direct, and true. He is not bound to use them; but if he does, he admits them. The judge was therefore right, in refusing to admit the garnishee's examination to be read in contradiction of his answers. He confined himself to evidence of that kind, and did not extend his rejection to every kind of evidence from every other quarter. There was no refusal to admit evidence to show that the garnishee was mistaken. But these points are immaterial, if the court below was right in their charge as to Dr. Stevens' assignment; for if the court did commit an error, yet if the judgment be right on the whole, it will not be reversed. *Edgar v. Boies*, 11 Serg. & Rawle, 451; *Allen v. Rostain*, Id. 373, 374; *Munderbach v. Lutz*, 14 Serg. & Rawle, 220.

2d. The main question is, whether the assignment did not pass Stevens' interest in the money now demanded, to his assignees. The only fund in question was that received under the Florida treaty. The case stood on the assignment, and the acts under it, to which *Adlum* was a party. The assignment passed this interest generally and specially, and it appears from *Adlum's* receipts that he received nearly seven thousand dollars

[Adlum v. Yard.]

from the assignees out of the effects assigned. The assignment was never abandoned, but the assignees waited for the Asia and Dolly, to obtain the means of making another dividend. It is objected that the deed is void on its face, by reason of the clause relating to the lands. To this it may be answered, that no deed is absolutely void, even though it tend *to delay [*169] creditors. Roberts, 3 Stat. 13 Eliz. c. 5. It is void only against certain persons whom it injures. It is good against Stevens, who could not assert this money to be his. It was never received as such. The attachment claiming this as Stevens' money in Yard's hands, insists that Yard was the debtor of Stevens, in spite of Stevens' own act. The assignment was likewise good against all creditors assenting to it and adopting it. *Volenti non fit injuria*. Anderson v. Roberts, 18, Johns. 525, 526; Thomson v. Dougherty, 12 Serg. & Rawle, 459; 1 Bac. Ab. 444; 22 Vin. 13, pl. 18; Id. 24, pl. 2, note. *Non constat* that there was a single creditor who did not assent and take a dividend. It is perfectly clear that Adlum did. He, therefore, was not delayed or hindered. He might have avoided the assignment, and resorted to the land by virtue of his mortgage. It is further objected, that being originally void, the assignment is incapable of confirmation. It has been shown that it was not utterly void. The doctrine of confirmation is not applicable. It is not the case of a defeasible estate, by reason of a defective title in Stevens, the real title being in another; but of a deed voidable by creditors, who have elected to approve or not to question it. The objection that the instrument was void in consequence of the continued possession of Stevens, is not supported in point of fact. The taxes paid by Yard, were on Mrs. Stevens' lands, and charged to her husband. There is nothing to show such a possession on the part of Stevens, but decided acts to the contrary.

In reply, it was observed, that the act of 1789 did not devolve the hearing of the case upon the court, exclusive of the jury. (The court deemed it was unnecessary to argue that point.)

In respect to the assignment, the plaintiff did not claim under Stevens, but against him, and to the overthrow of his acts; like the creditor proceeding to judgment and execution, according to Judge Duncan's opinion in Thomson v. Dougherty. The delay on the part of Stevens' trustees, could not be accounted for in the manner proposed. In 1807, the treaty of 1819 could not have been anticipated; and from 1819 till the present day they have remained entirely inactive. We must suppose, either that they had relinquished their trust, or that the objects of it had been accomplished.

[Adlum v. Yard.]

The opinion of the court was delivered by

GIBSON, C. J.—Under the act of 1805, the case of the garnishee was exactly that of any other defendant, the burthen of proof resting exclusively on the plaintiff. But under the act of 1789, his position is entirely changed; being held liable in the first instance, and till he purge himself on oath. His situation, therefore, is not that of a witness, or a respondent in equity; nor is his answer, when used against him, to be used as evidence originally adduced by the plaintiff. Like a deposition which has passed publication in chancery, it is in evidence before the [*170] hearing, but in evidence on the *part of the garnishee, who could not else sustain himself long enough even to get before a jury. The plaintiff may, therefore, use it or not at discretion, just as a party may use answers extorted by a cross-examination; and he is consequently not bound, as in the case of a bill of discovery, to take the answer as true, but may discredit it in the same way that he might discredit the evidence of a witness on the adverse part. Where the garnishee neglects or refuses to make “full, direct, and true” answers, the matter charged is to be taken *pro confesso*, and judgment rendered against him; so that the governing principle of the act is to hold him chargeable till he discharge himself, at least by his own oath; and, failing to do so, he is to remain fixed. This is expressly his condition before answer put in. But where the answer is *prima facie* sufficient, its truth may be inquired of by a jury; and the plaintiff makes out his case merely by destroying the effect of the answer, unless the garnishee has maintained the issue by other satisfactory evidence; and this the plaintiff may do by disproving the matter alleged in the answer, or by showing the garnishee to be entirely unworthy of credit. In doing this, he restores the responsibility of the garnishee to the footing on which it was before the exhibition of the answer. On this principle, evidence which falsifies any fact asserted in the answer, goes to the credibility of the garnishee, and is therefore competent. This construction may seem severe; but it is entirely in accordance with the spirit of the act; and it is not more so than policy has been proved by experience to require. All necessary facts and circumstances are, for the most part, exclusively in the knowledge of the garnishee; and without holding him to a strict account, the remedy by foreign attachment would seldom be effectual. It is not to be understood from this, that every step is necessarily fatal, or that a plaintiff entitles himself to a verdict, where the jury are satisfied from the whole evidence, that the garnishee has in truth no effects of the original debtor. But where the cause goes to the jury with no evidence on the part of the garnishee but his own answer, and that is discred-

[Adlum v. Yard.]

ited entirely, or as regards the facts which constitute his title to a verdict, the jury are bound to find against him.

How does this bear on the question of evidence? In his answer to the second set of interrogatories, the garnishee had stated, that Doctor Stevens was not originally interested in the cargoes of the Asia and the Dolly, and that no specific payment on account of his interest, was ever made by him; but that he became chargeable by the respondent in a heavy account pending between them; and that the advances made by the respondent would alone have absorbed, to within a trifle, the amount which Doctor Stevens could have claimed. At the trial the plaintiff offered the final examination of the garnishee before the commissioners of bankruptcy, "in order to prove that the same James Yard (the garnishee) was not entitled to claim certain credits stated to be due to him for advances made by him before his bankruptcy for the said Edward Stevens." It is obvious, on the *principle I have indicated, that the evidence thus [*171] offered was competent to contradict a fact distinctly asserted by the garnishee.

The exception to the charge is not sustained. The clause in the assignment by which the trustees were to be restrained from selling the land for a period of three years, was undoubtedly in delay of creditors, and brought the whole within the purview of the 13 Eliz. The plaintiff might originally have repudiated this assignment, but having taken a dividend under it, he shall not now question its validity. It has been pressed on us, that a contract forbidden by a statute, is incapable of confirmation, except on terms which render it consistent with the statute, and for a new consideration. No one can doubt it. But surely the acceptance of a dividend under a deed of trust, is a new and a perfect consideration. Any one may waive the advantage of a law introduced for his own benefit; and I cannot imagine why creditors may not ratify a contract fraudulent only as to themselves, even in anticipation of a benefit. But where money is actually received, and on an implied condition that the receiver shall not question the title, every principle of natural justice requires that the condition should be performed. The doctrine of election is more analogous to estoppel than confirmation; and an estoppel may arise as well from matter *in pais* as matter of record. Doctor Stevens might have excluded the plaintiff from the benefit of the trust altogether; and had he supposed the latter would not have agreed to every part of the arrangement, he would certainly have done it: so that the plaintiff having accepted a dividend on the only terms on which it was offered, is as effectually concluded from claiming in repugnant rights, as if he had asserted the validity of the deed of

[Adlum v. Yard.]

trust in a court of record. But it is supposed that the doctrine of election is inapplicable to creditors. There is no adjudication in support of this, but *Kidney v. Coussmaker*, (12 Ves. 154,) which cannot be cited here as an authority for anything whatsoever, and from which, in the broad terms in which the principle is predicated, I entirely dissent. That was the case of a devise of part of the estate to trustees for payment of debts; and it was held that the creditors having obtained from the trust fund, satisfaction only in part, were not precluded from recourse to other parts of the estate which passed by the same will. To this I entirely assent, because the creditors could not be viewed as legatees, and the setting apart of a portion of the estate for the sake of convenience, indicated no intention that the creditors should not be paid in the event of its falling short. The law, therefore, would not imply a condition that the creditors should relinquish their rights on the rest of the estate. But the unqualified assertion of the Master of the Rolls that the doctrine of election is utterly inapplicable to creditors, seems to be received with many grains of allowance even in England. (1 Hovenden's notes to Vesey, 172.) In *Irvine v. Tab*, decided at the last term for the Western Circuit, we applied it to creditors claiming different debts under the same mortgage. In the [*172] case at bar, the debtor *might prescribe the terms; and the plaintiff having received his dividend on an inherent condition to permit the whole arrangement to take effect, it seems clear that, subsequent to the period of acceptance, the debt attached as due to Doctor Stevens, was to every intent vested in his assignees.

But it is supposed the court erred in charging that no presumption arose from lapse of time, that the objects of the trust had been accomplished or abandoned; in either of which events, the contingent resulting trust in favour of the debtor, would have taken effect in possession. There was, it seems however, a lapse of but seventeen years from a time when the business of the trust was in full activity; a period which without corroborating circumstances, is too short to raise a legal presumption that the debts were paid, or that Mr. Yard's estate had within the prescribed period been found sufficient to discharge all his debts for which Doctor Stevens had become responsible. Besides, the delay is satisfactorily accounted for by the fact that the effects on which the attachment is laid, were received but a short time before; and it does not appear whether there was, in the mean time, any other property in hand. In the absence, then, of all circumstances but such as tended to rebut the supposed presumption, the court did not err in charging that the lapse of time was insufficient to revest the property in the assignor.

[Adlum v. Yard.]

The following opinion was delivered by

HUSTON, J.—It has been said, that one or more questions arise in this case which are entirely new—have never been raised in any case, or decided by any court. Perhaps this is true. But it does not follow, that these questions are all of them difficult.

The first act about attachments, passed in 1705, (Purd. Dig. 37, 1 Sm. Laws, 45,) contemplates a trial by jury throughout, and expressly mentions, in the fourth section, “If the plaintiff in the attachment obtain a verdict, judgment, and execution,” &c. And, in the fifth section, expressly provides for a trial by jury, when the garnishee denies that he has goods, &c., and directs the course of the proceeding after the verdict. This act, however, made no provision for compelling the garnishee to disclose what goods, chattels, moneys, and credits of the defendant were in his custody and possession, or due and owing by him to the defendant. To obtain this disclosure, an act was passed the 28th of September, 1789, (Purd. Dig. 38, 2 Sm. Laws, 502,) called a supplement to the several laws about attachments; by the second section of which it is provided, that the plaintiff, after having obtained judgment against the defendant, may prepare in writing, and file in the court out of which the attachment issued, such interrogatories, upon which the said plaintiff is or shall be desirous to obtain and compel the answers, of any and every garnishee, in whose hands the said writ or writs of attachment hath or have been or shall be respectively laid and served, touching the goods, chattels, moneys, effects, and credits of the said defendant or *defendants, in his [*173] or their possession, custody, and charge, or from him or them respectively due at the time of the service of the writ of attachment, or at any other time.

Section third provides, “Each and every such garnishee or garnishees to whom a copy of such interrogatories shall be delivered, is and are required and enjoined to appear, &c., and exhibit, under oath or affirmation, full, direct, and true answers to all interrogatories by the said plaintiff prepared and filed; and, if any garnishee or garnishees shall neglect or refuse so to do, then and in such case it shall and may be lawful for the justices of the proper court, and they are hereby required to adjudge, that such garnishee or garnishees, so neglecting or refusing as aforesaid, hath or have in his or their possession, custody, or charge, goods, chattels, moneys, and effects of the said defendant or defendants, in such writ or writs of attachment respectively named, or is and are indebted to such defendant or defendants, to an amount and value sufficient to pay and satisfy the debt, claim, or demand of the said plaintiff, together

[Adlum v. Yard.]

with legal costs and charges of suit. And shall award execution against the persons or goods, &c., of the said garnishee or garnishees, and proceed in the same manner as if judgment had been obtained or pronounced in pursuance of the verdict of a jury or by virtue of the confession of the party."

It is now contended, the court, and the court alone, are to decide whether the answers are full, direct, and true; and, more, that the court is to decide on the answers themselves, without any evidence whatever to contradict the answers.

It may be conceded, that the court could decide, without going out of the questions and answers, whether the answer was direct; and, in one sense of the word, whether the answer was full; but in another, and in such case more material sense of the word, the court could not decide. For example—to the question what goods and effects of the defendant the garnishee had in his hands, the garnishee might answer as to part of the goods, and say nothing as to other goods. It may be said this would come under the word true. Be it so: my construction of the phrase is, that each answer must be full, and direct, and true—exactly tantamount to an oath to a witness, "to testify the truth, the whole truth, and nothing but the truth." The witness, whose testimony is not correct in all these particulars, is perjured, and may be indicted and punished, if the aberration from truth was intentional and material. So, perhaps, could the garnishee. This punishment, however, does produce justice to the party whose cause is trying; and he is permitted, by other testimony, to explain or contradict any testimony which would destroy his cause of action or his defence. Admit, however, for a moment, that the court alone were to judge of and decide on these answers, how they could determine whether they were full and true, without hearing other testimony, is for those to explain who advocate this position. But it is perhaps [*174] only contended, that the *answers are conclusive as to their fulness and truth when the plaintiff reads them; and that when he has read them, he shall not be permitted to contradict or vary them in any particular.

I am of opinion that he may read them, and afterwards show that they are neither full nor true.

As respects the plaintiff's demand against the defendant, in the attachment, let it be remembered that is already established, and a judgment entered. The *scire facias* and interrogatories are not to make out a case as between the plaintiff and defendant; but to enable the plaintiff to recover the amount of his judgment from goods, &c., of the defendant, alleged to be in the possession of the garnishee, and, further, the interrogatories are not, and need not be, resorted to where the garnishee has at all

[Adlum v. Yard.]

times disclosed what goods, credits, &c., of the debtor were in his hands. It is only where the garnishee denies that he has any goods, or the plaintiff supposes him to have more than he admits, that this proceeding is necessary. The first act is not repealed, and you may proceed under it, if it will answer the purpose. The matter then in dispute on this *scire facias*, and the interrogatories, is a matter between the plaintiff and the garnishee, and in which, but for this act of assembly, the plaintiff could not obtain the answer of the garnishee. It is not the case of a plaintiff calling a witness, and afterwards discrediting his testimony, which I shall leave as it is in the decisions of our own courts in the cases cited.

It is much more analogous to a bill in chancery, and the answer of a trustee who is called upon to state on oath, whether he has effects liable to pay, and in consequence is liable to pay, the debt of the plaintiff; in which case, if the cause is tried on bill and answer, the answer is taken to be true; that is, where it is, on the face of it, full and direct. But the plaintiff may deny the truth of it, and if its truth is put in issue, may disprove all or any part of it.

Now, in this case, an issue was regularly formed. I do not, however, admit that we are to go to the practice of Courts of Chancery for our direction as to the mode of proceeding under our acts of assembly. It may be referred to, but it is not conclusive. This act of 1789 was intended to be carried into effect by a Court of Common Law, and by the process of our Common Law Court. A chancellor might commit, for refusing to answer, or to give a full and direct answer; but he would not sell the goods of the party refusing, and collect the debt of the plaintiff.

I have shown the first act contemplated, nay, provided for, a trial by jury, where the garnishee pleaded that he had no goods, &c., of the defendant. That act is not repealed by the supplement: it is left in full force, and an additional mode of obtaining information as to debtor's effects is given to him. But, even where the garnishee answers, that he has no goods, &c., he is not done; he is not discharged; he must plead to the *scire facias*, and the plaintiff may take issue on his plea, and a trial be had. We have several acts of *assembly, which, [*175] from the letter of them, would seem to give to the court alone the power of determining facts as well as law. For example, the twelfth and fifteenth sections of the act for opening, repairing, &c., roads, which gives to justices of the peace a power of proceeding against supervisors neglecting their duty, or against individuals obstructing a road, with the right of appeal, in each case, to the Court of Quarter Sessions, who shall take

[Adlum v. Yard]

such order thereon as to them shall appear just and reasonable ; and the same shall be conclusive. Under this act, so far as I know, the practice has been, where the fact of neglect of duty, or of obstructing the road, is denied, not for the court to decide it, but a bill of indictment is sent up, and the facts decided by a jury, and I know of no other mode of proceeding in use. There are similar acts in more than one of civil cases ; in all of which, so far as I know, where facts are contested, an issue is formed in the cause, or a feigned issue, to settle the facts.

If the defendant's construction is right, the act of 1789 would produce one of two effects : it would leave the plaintiff's rights and recovery perfectly at the mercy of the opposite party ; for I have shown that the garnishee has, where the truth of his answer is contested, become the real party, or it would be of no advantage to the plaintiff at all. That the practice has been, to go on to trial after the answers of the garnishee, and to prove ; if it can be proved, that his answers are not full and true, seems to me to be fully proved by 2 Dall. 113, where the court establish a rule as to costs in such cases.

A garnishee may appear before the court and jury in situations very dissimilar. He may have no claim to any part of the funds,—may be perfectly indifferent between the different claimants of the fund, or he may allege a right to retain a part or the whole of it, on some contract or for some debt to himself. A factor may retain for the balance due him, or a consignee may retain goods consigned to him, to pay a debt due to himself, or a debt due to himself from the consignee, though the goods were not consigned expressly for that purpose. 1 Dall. 3. But where a foreign attachment is laid on such goods, the garnishee must show that there is a debt due to him from the consignee by other evidence than his own oath. The act directs interrogatories as to goods, &c., in his hands and custody, or debts due from himself, and to such interrogatories, he is compelled to answer. If he goes beyond this, and states any debt due to himself from the absent debtor, his oath is no evidence of such debt. If he goes still further, and states particulars of how it became due, and when and to what precise amount, his answer in this particular is beyond the intention of the act ; and, if such part of his answer could be separated from the rest, in my opinion it ought not to go to the jury at all. If it be so mingled and interwoven with the disclosure of what is in his hands as not to be separated, the jury ought to be told it is no evidence of the facts stated. It can, at best, be only considered as notice of what he intends to prove, and which ought to be

[*176] *disregarded, unless proved ; and, as to all such parts of the answer as go to show a right of retainer by the

[*Adlum v. Yard.*]

garnishee, the plaintiff may disprove it by any legal evidence which he can adduce. It has been said that part of more than one of these answers was argument—matter stated hypothetically. If so, such part clearly was not evidence, and ought to have been rejected. But the plaintiff did not consider it so, nor did the court; nor do I think it was so intended by the garnishee. His counsel did not put it on that ground at the trial. The expression, “The respondent has a just claim upon the said Edward Stevens, for the balance of an account current settled in Dec., 1824, to the amount of four thousand six hundred and eleven dollars and three cents,” in No. 6, of the first interrogatories; and the expression, that after Stevens became interested in the Asia and Dolly, “he became chargeable by the respondent in a very heavy account pending between him and the said Stevens,” in the latter part of the first answer to the second set of interrogatories, are not, and were not, intended as arguments. The fact that he had a contract with Stevens under which he claimed half the money recovered, was no argument.

But there is another view of this matter: if the money received under the Florida treaty, above twelve thousand dollars, would be the right of Stevens as part owner, and above twenty-eight thousand would go to the assignees of James Yard, to be distributed among his creditors: that is, creditors before his bankruptcy, was Stevens one of such creditors, and to what amount? If he was, he is entitled to a dividend, and that dividend, for anything we see in this cause, is as much in the hands and possession of James Yard, and as much liable to this attachment, as the part allotted to Edward Stevens by name. I say for anything we see. I understand the whole of this money to have been in the hands of James Yard when the attachment was laid. Whether this dividend, if there is any due, can be recovered from the garnishee, in this proceeding, or must be sought for from the assignees of James Yard, or is due to the assignees of Stevens; or whether Stevens has any assignees, must depend on matters not known to this court, and I give no opinion about them.

It will appear from what has been said, that in my opinion the plaintiff ought to have been permitted to prove more in the hands of the garnishee, than was admitted, if he could so prove; that, as to any claim of the garnishee to the property or money in his hands, he was bound to prove his right to it by other testimony than his own oath; and that the plaintiff had a right to rebut that proof or any statement on that subject, by the garnishee himself, by any legal proof admissible in any other cause between contending parties; for I repeat, that where the garnishee admits the receipt of goods or money, but sets up a

[Adlum v. Yard.]

right to retain it, the suit is from thenceforth one between the plaintiff and garnishee, in substance and almost in form.

[*177] *The act of 1789 contemplates a judgment against the garnishee, if he refuses to answer, or his answers as to what is in his hands are not full, direct, and true; and I have said, whether they are so, may, and often must be decided by a jury. Whether the jury ought or can give a verdict against him for the whole of the plaintiff's demand, if they find that his answers are not full, direct, and true, has not been discussed, and I do not wish to give a binding opinion on this. I should suppose there were cases in which they might and ought to do so, but that this would only be where they found a plain intention to conceal or mislead as to the amount in the hands of the garnishee, but by no means on account of the garnishee failing to support his own claim of retaining for himself. It is for concealing the goods in his possession that this penalty is inflicted; not for setting up an unsupported claim to those goods.

Another and most important question arises in another part of this cause. The deed of assignment by Stevens has some unusual clauses; no sales are to be made of the real estate for three years from the date of the instrument. It also appears by this instrument and the indorsement, that Stevens was liable for above ninety thousand dollars on James Yard's account; and it provides that if James Yard or his assigns, paid or discharged this debt within three years, the assignment was not to have effect; but Stevens' estate was to be restored to him in the same manner he held it before the assignment.

As I understand the law, either, and *a fortiori* both these clauses render this deed, in the words of the law, utterly void, frustrate, and of no effect. If this is not to delay and hinder creditors, to drive them to compromises, to releases, to defeat their claims and prostrate their rights, I do not see what would have those effects. Assignments by debtors have been supported in this state under circumstances, and containing clauses which would avoid them in any other country governed by the same laws, and as I believe, clearly against both the letter and spirit of the law. An unwillingness to disturb and unsettle many assignments made and acted upon before any of those cases were brought before the court, led to those decisions. The decided cases have given a sanction as far as they have gone. I do not agree to go one jot further. If assignments have been made not sanctioned by decision, I do not agree to give them my sanction; for we must stop somewhere: we must, at some point and at some time say, no matter how many have violated the law or how long it has been acquiesced in; the law has said the deed is utterly void, and we must say so also; and if a debtor can

[*Adlum v. Yard.*]

assign his property—keep his creditors from touching it for three years, he may for thirty, there is, in fact, little difference; the creditor, in most instances, will be ruined or prevented in some way from getting his debt as effectually in the one case as in the other.

But it has been argued that this deed has been confirmed or rather *rendered valid by some acts of the plaintiff in this cause, at least valid as to him, and a case has been [*178] cited where a deed of a married woman which was void, had been rendered valid by a delivery after she became sole. It would be more correct to say that a new deed after she became sole, conveyed the land. A deed takes effect from the delivery, before the second delivery it was no deed; after the second delivery, it was a deed from that time. If there is any case where a deed made void by a positive law has ever been held valid, it has not been cited, and among the many decisions on the law in question, I can find no dictum that such a deed can ever become valid. Who can give it validity? All the creditors, it is said, may agree beforehand to such a deed. Be it so; but then the case of a contract with creditors is presented, and not a deed to delay and defraud; then it would be a stay of execution by creditors, not one imposed on them.

But they may agree afterwards. They may, I admit, agree not to object to it; but they must all agree. If one does not, he may treat the deed as void and take the property. In such a case what is to become of those who had agreed or were willing to agree?—They get nothing. But did they agree to this?—You must let the court see their agreement before the extent and effect of it can be decided on. If the agreement is written, the court decide on it; if by parol, a jury must decide whether such agreement was made, and what it was, before a court can say what the effect of it is.

But it is said the plaintiff who has received money, a part of his debt, cannot now say the deed is void, and his receipts show that he received money from these assignees. A creditor to whom three thousand dollars is due, may be, and often is glad to get a part of it from any source; he may be in want, at the door of a jail, or his family starving. (I do not speak of this case, for I do not know the facts.) He may be deceived, misinformed, he may not have seen the deed:—is his receipt of money in all cases, under all circumstances to bind him?—If not, and there may be any case in which he would not be bound, the court were wrong in taking this matter from the jury. But it is said a man cannot affirm and disaffirm the same thing. I admit he cannot do so at the same time; but he may at one time, under a mistake, treat a deed or will as valid, and not be

[Adlum v. Yard.]

bound to admit it to be so at all times and with other information.

A man who accepts a small legacy, much less than what would be his distributive share of an estate, and does so because he has been told there is a will, is not precluded from claiming more when he finds there was no will, or that it was void because the testator was insane when it was made, or an infant, or that it was inoperative because only one witness could be found who could prove it. A person cannot hold what he has got under a deed or will, and which he would not have gotten but for such [*179] deed or will, and *still recover what he would be entitled to, independent of such instrument. But on accounting for what he has received under a mistake, and admitting it to have been received under a mistake, he may get what by law he is entitled to in addition. This generally, length of time, or other circumstances may form exceptions.

If a creditor under a mistake, or from misrepresentation, has signed a release, he may be relieved from it. I do not see, then, how he can be absolutely precluded by an act *in pais*, the most equivocal of all possible ratifications. And I do not agree that creditors who have a right independent of the deed or will, are put to their election. They may take what is devised or conveyed for payment of debts, and, if not satisfied, resort to other property for the balance. To them the doctrine of election does not apply, as it does to volunteers, or persons who but for the instrument would have no claim.

I would say, then, that this deed was totally void, and not validated by any act done, taking it in the strongest sense against the plaintiff; but, if it could be validated, that the act of receiving part of his debt was not such an act,—at least, that being a matter *in pais*, it must be left to a jury, and not decided at once by the court.

I think, also, the question whether the sums for which Dr. Stevens was responsible for James Yard were discharged, was open to investigation, if the deed was ever good; and that it was proper to inquire whether the supposed assignees of Stevens ever acted; and, if they did, when they ceased to act; and how far they have abandoned the trust, and the trust property might be material in this case. I know nothing of the circumstances of this case; but I conceive it possible, that a case may exist where the assignees have totally abandoned the property, or never intermeddled with it;—in which case it would be great injustice to interpose their names, and use their neglected or abandoned title to defeat a creditor pursuing his right according to law.

It is not enough that a man has executed a deed of trust with-

[*Adlum v. Yard.*]

out consideration, and has acted as if it was accepted by them in some particulars, or has done some acts in their names, or procured some one to do so. Where a trust has really been created for a good and lawful purpose, chancery will not suffer it to fail for want of a trustee; but I suspect we have many trusts of a kind unknown to any chancellor; and this court has decided, that a conveyance to trustees for payment of debts, of personal property, of which no possession was delivered, and where the debtor went on to act for many months, as before the conveyance, was totally void, and the goods were as subject to the execution of a creditor as before the conveyance. I would then permit an inquiry whether such acts have been done as prove whether there was an acceptance of the trust; and that it is, or is not, and has not been treated both by Dr. Stevens, and the assignees as at an end—and how long;—for where there is no Court *of Chancery to compel a discovery or a reconveyance, we must attain the object in some other way, [*180] and not lock up an estate for ever by a conveyance not operative. All this, however, would not be necessary, if, as I hold, the conveyance was void in its creation.

TOD, J., concurred with HUSON, J., except as to the deed not being rendered valid by the subsequent acts of the creditors.

SMITH, J., was absent.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 1 Penn. R. 330; 3 Penn. R. 126; 5 R. 147, 223; 5 Wh. 62; 3 W. 187; 6 W. 248; 1 W. & S. 298; 4 W. & S. 22, 391; 6 W. & S. 73; 8 W. & S. 431; 2 Barr, 479; 3 Barr, 149; 7 Barr, 232; 2 J. 39, 298, 326; 1 H. 185, 307, 366, 535; 2 H. 440; 5 H. 270, 348; 9 H. 439; 2 C. 65; 7 C. 56; 6 Wright, 335; 9 Wright, 18, 25; 1 S. 201; 3 S. 492; 1 G. 154; 7 S. 500; 8 S. 111; 8 S. 487; 9 S. 27; 9 S. 480; 20 S. 179; 26 S. 282; 26 S. 294; 30 S. 151; 1 W. N. C. 164; 2 W. N. C. 9; 10 W. N. C. 39; 12 W. N. C. 167, 169.

Cited by the Court, 1 Penn. R. 42; 2 Penn. R. 92; 3 Penn. R. 91; 6 W. 95; 8 W. 281; 6 W. & S. 311; 7 W. & S. 125; 4 Barr, 195, 449; 5 Barr, 176, 480; 9 Barr, 299; 10 Barr, 314; 1 J. 408; 2 H. 126; 7 H. 420; 1 Par. 474; 2 Par. 147; 1 C. 287; 8 Wright, 14; 12 Wright, 381; 3 S. 352; 6 S. 128; 7 N. 222.

In *Hays v. Heidelberg*, 9 Barr, 207, the Court say the case of *Adlum v. Yard* pushes the doctrine of election by creditors as far as it safely can.

One knowing his rights, who claims a benefit under a transaction which he might avoid, thereby ratifies it and is equitably estopped from avoiding the transaction to the prejudice of others. This has been affirmed in voidable assignments for creditors: *Crowell v. Meconkey*, 5 Barr, 168; *Thomas v. Phillips*, 9 Barr, 355; also where one receives the proceeds of a judicial sale which he might have avoided, whether a sheriff's sale: *Stroble v. Smith*, 8 W. 281; *Hamilton v. Hamilton*, 4 Barr, 193; *Spragg v. Shriver*, 1 C. 282; or a sale under the order of the Orphans' Court: *Wilson v. Bigger*, 7 W. & S. 111. Where the proceedings are valid the principle here discussed applies *a fortiori*: *Wilkins v. Anderson*, 1 J. 408. Entering exceptions to a report of distribution, but afterwards withdrawing them, does not work an estoppel: *Reinhard v. Keenbartz*, 6 W. 95.

Whether a *void* sale may be ratified by a receipt of its proceeds is a more perplexed question. In *Smith v. Warden*, 7 H. 424, it is said that this principle of estoppel applies to a void as well as a voidable sale, and see *Crowell v.*

[Adlum v. Yard.]

Meconkey, *supra*. In *Gardner v. Sisk*, 4 S. 506, a directly contrary doctrine is announced, and *Crowell v. Meconkey* overruled. But in *Duff v. Wynkoop*, 24 S. 300, 306, *Smith v. Warden* is cited as authority. The real difficulty perhaps lies in the question, "What is a *void sale*?" and the cases above may be distinguishable under this view; see *Gardner v. Sisk*, *supra*.

The doctrine has lately been applied to privileges enjoyed under Acts of Assembly, and the party estopped from setting up that they are unconstitutional: *Bidwell v. Pittsburgh*, 4 N. 412; *McKnight v. Pittsburgh*, 10 N. 273.

Another point arises from the cases cited, namely, must the benefit be received immediately by the person against whom the estoppel is set up? If received by one under whom the present party claims it is sufficient, *Maple v. Kussart*, 3 S. 348, but the fact that the judgment creditors of the party receive the benefit does not estop the party himself: *Gardner v. Sisk*, 4 S. 506. According to the earlier cases a receipt by a guardian for his ward is within the rule, *Wilson v. Bigger*, 7 W. & S. 111, or by his committee for a lunatic, *Beeson v. Beeson*, 9 Barr, 279; but *Warden v. Alexander*, 2 H. 126, overthrows both these cases. The fact that one has claimed under a voidable assignment as a creditor does not estop him as a trustee in insolvency: *Weber v. Sammel*, 7 Barr, 499; *Thomas v. Phillips*, 9 Barr, 355.

[*181]

*[PHILADELPHIA, JANUARY 24, 1829.]

Ehrenzeller *against* The Union Canal Company.

IN ERROR.

The secretary of the Union Canal Company of Pennsylvania, incorporated by the act of the 2d of April, 1811, was such an officer, within the meaning of the supplemental act of the 29th of March, 1819, as the Legislature intended should receive no salary until the works were actually recommenced upon the canal.

Such an officer can claim no compensation for services, upon a *quantum meruit*.

The act of the 29th of March, 1819, does not violate the 10th section of the 1st article of the Constitution of the United States.

ON the return of a writ of error to the District Court for the city and county of *Philadelphia*, it appeared that the plaintiff in error, George Ehrenzeller, brought this action of *assumpsit* against the Union Canal Company, to recover a compensation for his services as their secretary, from the 17th of October, 1818, to the 21st of May, 1821.

The declaration contained four counts; the first of which claimed a sum of money, "for the pay of the said George before that time and then due and payable, from the said defendants to the said George for the services of the said George, before that time, by him, the said George, rendered and performed, as secretary of the Union Canal Company, duly appointed before that time, agreeably to the charter and by-laws of the said company."

The second count was for work and labour, care and dili-
200

[Ehrenzeller v. The Union Canal Company.]

gence of the said George, expended upon the business of the said company, in preserving their records, preparing their contracts, preserving their muniments of property, &c.

The third was on a *quantum meruit* for work and labour, care and diligence, as secretary of the defendants.

The fourth count was on an *insimul computassent*.

The defendants pleaded *non-assumpserunt*, and payment, with leave to give special matter in evidence.

The case, as disclosed by the evidence given on the trial, was as follows :

The Union Canal Company of Pennsylvania was incorporated by an Act of Assembly passed the 2d of April, 1811. (5 Sm. L. 266.) By the 6th section of that act, the stockholders were directed to choose five managers, one of whom was to be president of the company. The president and managers were authorized to appoint a secretary, engineers, and such other officers, and to allow them such compensations as they should find necessary and expedient.

In the year 1811, the president and managers were elected by the stockholders, and the company organized. On the 24th of July, *1811, the salaries of the president and managers were fixed by the stockholders, and on the 16th of [*182] November, 1813, their salaries were increased, that of the president to fifteen hundred dollars, and those of the managers to three hundred dollars per annum.

On the 26th of July, 1811, a secretary was appointed, who resigned in October, 1816, when the president and managers appointed the plaintiff their secretary. No particular sum was fixed by a vote of the board, as a salary for the secretary ; but it appeared that three hundred dollars per annum had been allowed to that officer ; and, at that rate, the plaintiff was paid up to the 17th of October, 1818. The plaintiff held the situation of secretary until the 21st of May, 1821, during which period he discharged his duties with fidelity and to the satisfaction of his employers. In addition to keeping the minutes of the Board of Managers, he had the principal care of the archives of the company, was required to be present at all the transfers of stock, and drew several contracts with the managers of the different classes of the Union Canal Lottery.

The plaintiff produced his account, audited and settled by the proper officers of the company.

The defendants admitted the plaintiff's right to recover for services performed prior to the 29th of March, 1819 ; and against the residue of his claim, they relied, for a defence, upon the 7th section of the act of that date, (7 Sm. L. 228), entitled, "An act supplementary to an act, entitled 'An act to

[Ehrenzeller v. The Union Canal Company.]

incorporate the Union Canal Company of Pennsylvania,' which is in these words: 'Be it further enacted, &c., That, from and after the passage of this act, no compensation shall be allowed by the said company to its officers, until the works are actually recommenced upon the canal; after which time the salaries may be regulated by the stockholders in the customary manner: *Provided*, That if the said work shall be suspended or interrupted for the space of three months, the salaries allowed to the said officers shall cease from the time of such suspension, and until the work be recommenced.'"

On the 12th of July, 1819, a letter was sent by the commissioners named in the act of the 29th of March preceding, to the president and officers of the company, informing them that their efforts to procure additional subscriptions had entirely failed; declining to make any further attempts to procure them, and recommending the raising of money by lottery, which was accordingly done.

The lottery fund amounted, on the 21st of May, 1821, to upwards of seventy thousand dollars, which had accumulated in part prior, and in part subsequent to the 29th of March, 1819. The company had also a considerable real estate, which had been taken for the route of the canal, before their proceedings had ceased in consequence of the expenditure of all their funds derived from private subscriptions.

In consequence of the act passed on the 26th of March, 1821, (7 Sm. L. 393), which pledged the aid of the state to the work, [*183] subscriptions *were obtained under the act of the 29th of March, 1819, and on the 11th of April, 1821, the fact was communicated to the president and officers of the company, by a letter from the commissioners; whereupon, there not being time to call a meeting of the stockholders, the president and officers ordered two papers to be prepared, to be handed for signature to the individual stockholders, declaring their acceptance of the new act. The board fixed the 21st of May, 1821, for the meeting of the stockholders to elect a new board; and this, it was contended for the defendants, was their first acceptance of the provisions of the act of the 29th of March, 1819.

On the 21st of May, 1821, a meeting of the stockholders was held, when officers were elected, agreeably to the provisions of the act of 1819. The plaintiff continued to hold the situation, and perform the duties of secretary, until the 21st of May, 1821, the original contract between him and the president and officers of the company never having been changed by the parties.

The evidence being closed, the case went to the jury under the following charge from the President Judge:—

[Ehrenzeller v. The Union Canal Company.]

“The questions of law arising in this case have been determined on a former occasion by this court, and I have only to express their opinion to you, that the plaintiff may be enabled to except to my charge, and have his bill of exceptions and writ of error to the Supreme Court. I state the law to be—That upon the facts in evidence, in this case, the plaintiff cannot recover from these defendants any compensation under either count in this declaration for the services rendered after the 29th of March, 1819. The law upon the facts is not altered by the manner of declaring in the second and third counts in this declaration. Nor is the plaintiff’s case the better by reason of the examination and approval of his account. He is entitled to recover, if at all, by virtue of his appointment as secretary on the 1st of April, 1816, and because of the services which he rendered in that character. He is not entitled by law to any compensation for his services as secretary to the Board of Managers of the company, after the 29th of March, 1819. Your verdict, therefore, should be for \$, with interest, being the amount due him on the 29th of March, 1819, and the interest.”

To this charge the plaintiff’s counsel excepted, and sued out a writ of error.

W. M. Meredith and Scott, for the plaintiff in error.

1. If the 7th section of the act of the 29th of March, 1819, be construed to extend to the present case, it is utterly void, because it is in violation of the 17th section of the 9th article of the Constitution of Pennsylvania, and the first part of the 10th section of the 1st article of the Constitution of the United States. It violated, in the first place, the contract created by the charter between the legislature and the company, which was a private corporation, *the rights of which cannot be impaired without its own consent. The king cannot interfere with [*184] the chartered rights of a corporation without trial and judgment, nor, on the same principle, can the legislature of Pennsylvania, without the consent of the corporation. No consent was given by the Union Canal Company to the act of the 29th of March, 1819, until the 21st of May, 1821; at which period the services of the plaintiff ceased. And, if such consent had been given, it would have been in violation of the contract entered into by the company with the plaintiff, to pay him the compensation agreed upon so long as he should continue in office, and until he should have notice of removal. 4 Wheat. 207, 656, 659, 662, 667, 682, 711; 8 Wheat. 84, 92; 3 Burr. 1661; 3 Kyd on Corp. 65.

But the court will, if possible, give such a construction to the act of assembly, as will reconcile it with the Constitution; and in this there is no difficulty. In the first place, it was not in-

[*Ehrenzeller v. The Union Canal Company.*]

tended to apply to the old officers of the company. The legislature contemplated a reorganization of the company, and intended to prevent, in future, the payment of salaries where no services were performed. It was not their intention to go back, and take away salaries from officers who were then receiving them.

But, in the second place, if the act was intended to embrace the old officers, it did not extend to the secretary. He was not such an officer as came within the provisions of the law, which referred to those who received large salaries and performed no duties. He was the only officer belonging to the corporation who received a small salary, and performed very laborious duties. If the business of the company was neglected, it was not his fault. He had nothing to do with the direction. The evil to be remedied, was, that the works upon the canal had ceased; and the object of the law was, that they should be recommenced. To effect this, the act of assembly provided a stimulus to those who had the management of the concerns of the corporation. Its provisions should, therefore, be confined to officers of that character, and not extended to mere ministerial officers, such as the secretary, engineers, &c., who had no control over the affairs of the company, and without whose previous services the works could not be recommenced.

The provisions of the act of assembly, relative to the salaries of officers, clearly show that the secretary was not within the view of the legislature. Upon the recommencement of the works, the salaries of the officers were to be regulated by the stockholders in the customary manner. The officers referred to must, therefore, have been those whose salaries it had been customary for the stockholders to regulate, and not the secretary and engineers, whose salaries had never been regulated by the stockholders, but by the managers in whom their appointment was vested. They were properly not the officers of the company, but of the managers.

But, if the secretary be comprehended by the act, the only [*185] *reasonable construction of it is, that salaries should not be paid until after the recommencement of the works; not that no compensation should, at any time, be allowed for services rendered before that period. The most laborious part of the business was to restore to order the deranged affairs of the company. Active exertions were to be made; contracts to be entered into; skill, prudence, and diligence were to be exercised; the president was restrained from pursuing any other mode of gaining a livelihood. Can it be pretended, that for all these exertions and sacrifices, no compensation whatever was to be made? or could it be expected, that if none were to be made,

[Ehrenzeller v. The Union Canal Company.]

the works would ever be recommenced? Some of the most important and laborious of the duties of the secretary, such as the drawing of contracts, and other preparatory services, must necessarily have been performed before the actual recommencement of the works. Those which were to be performed afterwards, were comparatively light. Upon the principle by which it is attempted to cut off the salary of the secretary, the surveying engineer, upon whose skill, capacity, and fidelity, the whole success of the work must have depended, would be denied any compensation whatever for his services, since those services must all have been rendered before the works could go into operation. The intention of the legislature was, that no salaries should be paid where no duties were performed. The former were to depend upon the latter; and when the recommencement of the works testified that duties had been rendered, compensation was to be allowed, as well for services previously, as for those subsequently performed.

The act of 1819 continues the obligations of the old corporation. All the privileges and immunities, and, consequently, all the burdens of the old company, were vested in the new one. Strictly speaking, it was not the creation of a new corporation, but the re-organization of the old corporation, under a new direction. The defendants admit their liability for services rendered prior to 1819, and therefore are precluded from saying they are not bound by the contracts of their predecessors. They cannot take all the property and all the benefits, and throw off the debts of those to whom they succeed. The old board acknowledged the plaintiff's claim, which was regularly passed by their proper accounting officers.

If the contract cannot be enforced for the salary of the plaintiff as secretary, he is entitled to recover on a *quantum meruit*, for his services as an individual. The defendants cannot deny his official character, in order to deprive him of his salary, and assert that character to prevent his recovering a just compensation for services actually rendered.

Binney, for the defendants in error.—It was competent to the company alone, to object to the constitutionality of the act of assembly by which they were remodelled; and they have made no objection. From the lips of third persons, such an objection *cannot come; nor can it now come from the company [*186] themselves, because they have accepted the charter, not merely from the time of their new organization, but *in toto*. Their acceptance has a retrospective operation from the date of the law. To say otherwise, would be to permit one party to adopt a contract in a sense different from what the other party

[Ehrenzeller v. The Union Canal Company.]

intended ; for it is certain the legislature intended that the law should go into operation from its date. The question, therefore, whether the legislature had power to pass the law, though by no means a difficult one, does not arise. The company have accepted the charter unconditionally, and do not now object. The objection is raised, by a third person, for them, and without their consent. It is true, that if he has a contract which is violated by the law, he may assert its unconstitutionality. But the plaintiff never had an express contract with the company after 1816, when he was appointed. He received no appointment afterwards. While he was acting as secretary in 1819, this act of assembly was passed. With a full knowledge of its provisions, he goes on to render services, without any new appointment or contract of any kind, knowing that if the law is valid, he cannot be paid. When, therefore, it was rendered valid by the acceptance of the company, he could not complain of the loss of his salary, because he acted with his eyes open, and had a mere implied contract, dependent upon the acceptance or non-acceptance of the charter by the company.

As to the construction of the act. Its terms are plain, and where there are no ambiguities, the court should make no subtle efforts to find out other meanings than those the words import. It is clear from the bill of exceptions, that the plaintiff never claimed in any other character than as secretary. There was no evidence of services rendered otherwise than as secretary, and the opinion of the District Court was, that he could not recover upon the common counts, for services rendered in that capacity. If he was an officer, and his services were rendered as such, he cannot dodge the act by claiming a compensation on a *quantum meruit*. The question then is, was he an officer ? That he was so in point of fact, there is no doubt ; but whether he was so, within the meaning of the act, is another matter. It is said that he was not the officer of the company, but of the managers ; but the minutes show, and so does the bill of exceptions, that whenever anything was to be done by the company, he performed it as their secretary. He attended the meetings of the company, and superintended the transfers of stock. Besides, the managers were the representatives of the company, and their acts were the acts of their constituents. The bill of exceptions states that the plaintiff in error was appointed by the managers, "secretary of the company," and then goes on to say, that he was entitled to compensation for his services aforesaid, that is, as secretary of the company. The distinction between [*187] engineers *and officers is obvious, and need not be dwelt upon. Every company must have a secretary, and if he is not an officer of the company, it is impossible to

[Ehrenzeller v. The Union Canal Company.]

imagine who is. He is more identified with its concerns than any other officer. He, as well as the other officers, doubtless performed some services, but those services were not such as the legislature thought entitled them to compensation. They declared, that until the recommencement of the works, the officers should receive no salaries, and the company accepted the terms offered. The president, managers, secretary, all the officers of the company were before the legislature when the law was passed, and no distinction was made between them. All were considered as sufficiently interested in the concerns of the corporation to perform the services preparatory to its re-organization. Whether the officer was appointed by the stockholders or the managers, was of no moment; the object being to cut off the salaries of all sinecure officers, no matter by whom appointed, in order to preserve the funds for the future operations of the company.

It is said the act was intended to apply to officers to be appointed; but such an interpretation would overturn to express language, and contravene its whole object. The legislature have said, that the law should go into immediate operation; and, if it had been otherwise, it would have been in the power of the old company to continue the old abuses as long as they pleased.

The account signed by the auditor and counsel avails nothing. It was against law, and of no effect; and it would have been the same thing if all the managers had acknowledged its correctness. They were bound, if at all, not as individuals, but in their corporate capacity, and could not, by their approbation, give validity to that which was contrary to law.

The opinion of the court was delivered by

ROGERS, J.—On the 2d of April, 1811, the legislature passed the act to incorporate the Union Canal Company of Pennsylvania; and, by the 28th section, gave the company authority to raise, by lottery, three hundred and fifty thousand dollars; and provided, that the profits arising from the lotteries should not form a capital stock of the company, upon which any dividend should be made to the stockholders, but that the same should be considered as a bounty to the corporation, to enable them to make the tolls as low as possible. The company, after having commenced the work, suspended their operations, having raised, and continuing to raise, large sums of money by drawing the lotteries authorized by the act. In the annual return to the legislature, at the session of 1819, the managers made a statement of their accounts; in which it appeared that large salaries had been paid and were paying to the officers of the company,

[Elhrenzeller v. The Union Canal Company.]

while little or no duties were performed, and that out of the funds (for they had no other,) appropriated by the legislature, for the special purpose of making the tolls as low as possible.

[*188] The plaintiff was *the secretary of the company, and as such was returned in the statement of their accounts, as in the receipt of a salary of three hundred dollars per annum. With a knowledge of these facts, which are alleged in the preamble to the section to be notorious, and for the purpose of preventing such abuses in future, the legislature enacted, "That from and after the passage of this act, no compensation shall be allowed by the company to its officers until the works are actually recommenced upon the canal; after which time the salaries may be regulated by the stockholders in the customary manner; *Provided*, That if the said work shall be suspended, or interrupted for the space of three months, the salaries allowed to the said officers shall cease for the time of such suspension, and until the work be recommenced." The defendants interpose this seventh section of the act of the 29th of March, 1819, in the way of the plaintiff's recovery, and allege that he comes within its words and spirit, which is denied by the plaintiff; and this, with the constitutionality of the act, forms the question which we are required to decide. The defendants say, the secretary is not an officer, and, if not an officer, that he is the officer, of the managers, and not of the company. With this I do not agree. He is as much the officer of the corporation as the cashier or clerk of a bank, who clearly are the servants of the company, and not of the directors, by whom they are appointed. And, in the 6th section of the act of the 2d of April, 1811, he is expressly called an officer; for it is provided, that the president and managers shall have authority to appoint a secretary, engineer, and such other officers, &c., and allow such compensation as they may find necessary and expedient.

But the plaintiff further contends, that although he may be considered an officer, in the strict sense of the word, he is not such an officer as was contemplated by the act; that the legislature had in view the president and managers, and not the secretary. It would appear to me to be strange, that if the legislature intended to discriminate between the secretary and others, who were in the receipt of large salaries out of public moneys, they should not have expressed their meaning in explicit terms. And where they have not thought proper to do so, it is not competent for us to make the distinction. It would be wresting language from its obvious import, in favour of a person, whom it appeared to the legislature, and to us, has been well compensated for any services he may have performed. The duties of a secretary of a company, which had entirely suspended

[Ehrenzeller v. The Union Canal Company.]

its operations, could not have been very onerous, and the legislature may well have been struck with the injustice, in his case, of squandering money appropriated to a public purpose, on a person whose duties were by no means burdensome.

The legislature, in the enacting clause, drop the word salary, used in the preamble, and say, "No compensation shall be allowed, by the company to its officers, until the works are actually recommenced."

*They seem to have anticipated, that expedients would be resorted to, to avoid the operation of the section, and [*189] have used a word which embraces every species of allowance which may be attempted for the services of the officers of the company, all whose proceedings upon the canal had long since ceased, and whose only funds were derived from lotteries, granted by the legislature. It will not do for the officers of the company to say, that although we cannot receive compensation, by way of salary, yet we are entitled to pay, for our services, on a *quantum meruit*. If this should be the construction of the act, it would be in the power of the managers to defeat the manifest intention expressed by the legislature, the preservation of the fund to enable the corporation to lessen tolls to be charged for the use of the canal. It would only be necessary to allow the whole salary, by way of compensation, for the company, who had already abused their trust, would be the judges of the *quantum* of service, and its value. And if this should be permitted, in the case of the secretary, the same rule must be adopted as regards the president and managers, who, in the opinion of the legislature, had evidently shown their willingness to appropriate to themselves large salaries, for which adequate services were not rendered. It is to be remembered, that the services for which he claims compensation, were performed by him as secretary of the company, and in no other capacity whatever.

It remains now to inquire how far the act interferes with the 10th section of the 1st article of the Constitution of the United States, "No State shall pass any law impairing the obligation of a contract."

If the moneys, arising from the lotteries authorized by the act, were public moneys, as the legislature considered, and of which no person can entertain a reasonable doubt, it would be a matter of regret if they could not interpose to prevent the continuance of a system by which the funds were diverted from their legitimate objects. The trust, in the opinion of those whose duty it was to take care of the public interest, had been violated, and the legislature, with their accustomed moderation and regard to private rights, pass a law, not to compel them to refund, but to prevent, in future, a practice calculated to retard, if not

[*Ehrenzeller v. The Union Canal Company.*]

wholly to prevent, the object of the grant, an internal communication between the waters of the Susquehanna and Schuylkill. The Constitution of the United States was not intended to prohibit the legislature from controlling a fund created for the public interest, and which had been perverted to private purposes by those to whose charge it had been committed.

But, it is said that a grant is a contract ; that this is a private corporation, and that the creation of a private corporation by charter, is such a grant as includes the obligation of a contract, which no state legislature can pass a law to impair ; and for this we have the authority of the Supreme Court of the United States, in the case *of *The Dartmouth College v. Woodward*, 4 Wheat. 656. Although these, as general positions, are conceded, yet it remains to show their application. The act of assembly did not, it is true, require the consent of the company to the alteration of the charter, yet in point of fact this assent has been given by the stockholders ; and I believe no person will be so hardy as to say, that the legislature are prohibited from altering a charter, in its most essential features, if the alterations be agreed to either before or after the passage of the act. The assent of the stockholders relates back to the date of the law, for in no other way could the company entitle themselves to the benefit of its provisions. When the plaintiff performed the duties for which he now claims compensation, he was aware of the consequence of a subsequent assent on the part of the company. I cannot, therefore, perceive that the plaintiff has any right to complain that the president and managers think it their duty to comply with every direction of the law to which the company owes its existence. It would be out of the power of the stockholders to accede to the alteration of the charter in part : they must accept all or none, and the section we are now considering, is among the essential provisions of this act. It violates no contract made with the plaintiffs before the date of the law ; for it is worthy of remark, that the secretary was appointed, as is usual, not for a term of time, but that he holds his office during the pleasure of the managers. He was free to perform the services of secretary at his own will and pleasure. He was neither bound to the company in any contract subsisting at the time, nor were they under any obligations to him. It is a singular feature in this cause, that the company do not complain of a violation of the charter : it is the secretary who insists that it is made in opposition to the Constitution.

Judgment affirmed.

Cited by Counsel, 5 Barr. 148 ; 10 Barr. 445 ; 5 Wright, 475.
Cited by the Court, 2 R. 369 ; 1 Wh. 48.

CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

EASTERN DISTRICT—MARCH TERM, 1829.

[PHILADELPHIA, MARCH 27, 1829.]

The Commonwealth *ex rel.* Taylor *against* Leeds.

HABEAS CORPUS.

The sister of a minor is competent, under the act of assembly of the 29th of September, 1770, to assent, as his next friend, to binding him apprentice to her own husband.

But such a transaction will be more strictly scanned, than where the binding is to a stranger; and if the contract be tainted with fraud or collusion, the apprentice will be discharged.

He will not, however, be discharged of course, where the covenants appear to be reasonable and proper on the face of the indenture, especially where the application is not made till the apprentice has ceased to be a burden.

A WRIT of *habeas corpus* having issued, commanding Gurdon Leeds to bring before the court the body of Henry Taylor, together with the cause of his detention, he returned that he held the said Henry Taylor by virtue of a certain indenture of apprenticeship, by which it appeared, that the said Henry Taylor, then aged fifteen years, had, on the 4th of July, 1825, with the consent of his sister, Margaret Leeds, (the wife of the said Gurdon Leeds,) acting as his next friend, his parents being dead, put himself apprentice to the said Gurdon Leeds, to learn the trade of a cabinet maker, to serve five years, six months, and twenty-four days; during which time the master covenanted to find him in boarding, lodging, and washing, to give him one quarter's night-schooling, and, when free, one new suit of clothes.

[The Commonwealth, ex rel. Taylor, v. Leeds.]

On this return, it was contended by *P. A. Browne*, for the minor, that he was entitled to be discharged from the service of his master. *At common law, (he said,) the deed of an [*192] infant is absolutely void. Even an indenture of apprenticeship entered into for his instruction and benefit, is not valid; 2 Inst. 379; 3 Leon. 637; 7 Mod. 15. But the act of assembly of the 29th of September, 1770, declares, that "all and every person and persons that shall be bound by indenture to serve as an apprentice in any art, mystery, occupation, or labour, with the assent of his or her parent, guardian, or next friend, or with the assent of the overseers of the poor, and approbation of any two justices, although such persons, or any of them, were or shall be within the age of twenty-one years at the time of making their several indentures, shall be bound to serve," &c. The question then is, whether the sister of the infant, being the wife of the master, was such a next friend as the act contemplated? No objection can be raised to the relationship of sister, who may, in ordinary cases, act as next friend where the parents are deceased: nor does the objection arise from her coverture; for a married woman may in some cases give her assent to the binding of her child. *The Commonwealth v. Eglee*, 6 Serg. & Rawle, 340. The objection is, that a feme covert cannot, as the next friend of her brother, assent to a binding to her own husband. It is one of those glaring cases of conflicting interests, in which the policy of the law obeys the precept of religion, "Lead us not into temptation." The obvious duty of a next friend in binding an apprentice, is to obtain the best terms for the infant; but how could the wife be expected to perform the office with fidelity, under the powerful influence, not only of duty to her husband, but of her own interest? The truth of this remark is strongly exemplified by the present indenture, which provides for only one quarter's night-schooling during a period of many years' service. Another duty of a next friend is to watch over the conduct of the master, and even of the mistress, upon whom much of the comfort of the apprentice must depend, and take care that the covenants in favour of the apprentice are duly performed. But it is obvious that this duty cannot be performed where the next friend is herself his mistress, and the wife of the master. But this indenture is void, not only on principle, but authority. In the case of *The Commonwealth v. Kendig*, 1 Serg. & Rawle, 366, an attempt was made to support an indenture upon the assent of one of these nominal next friends, but it failed. There *Cyrus Pearce*, who held the infant under an indenture, acted as next friend in binding her, by a second indenture, to *J. H. Baker*; and Chief Justice *Tilghman*, in delivering the opinion of the court, said, "I think it would be of dangerous

[The Commonwealth, ex rel. Taylor, v. Leeds.]

consequence to admit, that a man who is about to sell his apprentice, should take the place of next friend, because he must be supposed to be acting for his own interest, which is incompatible with the idea of a guardian." In the present case the next friend was acting for her own interest in making unfavourable terms for the infant, since her interest is identified with that of her husband. It is to be observed, that the late *Chief Justice considered the acting as next friend as tantamount to an assumption of guardianship; and according to Osborne's Case, Plowd. 293, where a woman guardian marries, the husband partakes of her rights as guardian; so that the assent here given was, in point of law, the assent of Gurdon Leeds to a binding to himself, which is clearly illegal and void. [*193]

2. The indenture in question not only purports to have been made with the assent of the sister as next friend of the infant, but she has covenanted for the performance of certain things on the part of the infant. It corresponds, in substance, with the instrument upon which the case of Mead v. Billings, 10 Johns. Rep. 99, was determined, in which the guardian was held liable upon the covenants to be performed by the infant. But how can a married woman enter into a covenant, particularly with her husband? In *The Commonwealth v. Eglee*, there were no covenants on the part of the feme covert, but merely an assent given to the binding. In the present instance, the wife acted in conjunction with her husband, and the presumption of law is, she acted under his coercion. A felonious taking of goods under such circumstances, would not subject her to an indictment for larceny. A transfer of her estate under such circumstances, would be void.

F. W. Hubbell, for the master, argued, 1. That Mrs. Leeds answered the description of "next friend" in the act of assembly. The father and mother being dead, and the infant having no brother who had attained the age of twenty-one years, the duties of guardianship and maternity devolved on his eldest sister, who was emphatically his "next friend." The act of assembly contains no such exception as coverture.

2. According to the strict technical rule of law the disability of coverture extends to acts in favour of third persons, as well as to those in favour of the husband. In the latter case, they are void upon the same principle as in the former; they differ only in degree. When, therefore, it was decided in *The Commonwealth v. Eglee*, that a feme covert may give her assent as a next friend to the binding of a minor, under our act of assembly, the present case was decided in principle. In the case just referred to, the nature of the assent required is thus defined:

[The Commonwealth, ex rel. Taylor, v. Leeds.]

"It is a personal confidence reposed in her by the act of assembly : she parts with no property, divests herself of no interest." A power of confidence reposed in a married woman, unaccompanied by any interest, may well be exercised by her in favour of her husband, though the exercise of it require discretion : as a power of sale, &c. Co. Litt. 112 ; 4 Cruise, 181 ; Tyser v. Williams, 3 Bibb's Rep. 368.

3. The cases of purchases by executors, trustees, &c., at their own sales, have no analogy to the present case, although such an identity of the wife with the husband be admitted, as to render the exercise of a power in favour of the husband, in effect an exercise of it in her own favour ; for at law such a purchase [*194] by an executor or trustee, *when made in the name of a third person, is good. Equity interferes on the ground of policy. A case like the present has never been agitated in courts of equity, and technical rules of equity, which preclude inquiry into the real equity of the case, are not to be extended beyond their letter. Equity avoids such a sale, by putting the purchaser in *statu quo*, returning to him the purchase money with interest, a tender of which is essential to the *cestui que trust's* claim of relief. Sug. on Vend. 433. But, on the present occasion, no offer is made of compensation to the master, for the instruction and sustenance of the apprentice during the time he has been with the master. Hitherto, he has been only a burden : his services, after he shall have acquired the trade, have been looked to as a requital.

4. The present argument goes no farther than that the fact of the next friend in the indenture being the wife of the master, does not *per se* vitiate the instrument. If there be actually undue influence, the case is otherwise. It is even conceded that the law regards such a transaction with jealousy. But if this indenture be subjected to the strictest scrutiny, it must be sustained ; for there is no extraneous proof of undue influence, and on the face of the indenture all the usual covenants are to be found. It has been objected, that the schooling provided for is not sufficient : to this it may be answered, that the boy was considerably beyond the usual age of binding, and so advanced in his education that he did not need more schooling than was stipulated for.

5. The act of assembly does not require the next friend to enter into any covenants, but merely to give assent ; consequently the covenants by the next friend, in this indenture, were merely surplusage, and could not vitiate it ; *utile, per inutile, non vitiatur*. The covenants on the part of the next friend being entirely in favour of the master, he alone can object to the indenture, if they are void.

[The Commonwealth, ex rel. Taylor, v. Leeds.]

The opinion of the court was delivered by

GIBSON, C. J.—There must undoubtedly be an actual, and not merely a formal next friend. His office, however, is not to bind the apprentice, but to allow the apprentice to bind himself. The covenants of the apprentice, although executed under the supervision of those whom the law has set over him, are exclusively his own. Such are the provisions of the act of assembly, and such was the construction of it in *The Commonwealth v. Eglee*. The practice has, for the most part, been for the *prochein amy* to express his assent by sealing the indenture; but no one ever thought of having recourse to him on the contract; at least no instance of the sort has fallen under my notice. The reason is, that the legislature has not said that he shall become a party. The assent is sometimes expressed by subscribing as a witness; but neither in the one case nor in the other, has the *prochein amy* considered that he was contracting any responsibility for the apprentice. His covenant, if any *existed, would be [*195] joint. But that would be inconsistent with his power, which is not to subject, by any act of his, the person of the apprentice to the dominion of the master: that can be done only by the apprentice himself. The *prochein amy* can join in the act, only so far as the law gives him authority; and, by the terms of the act of assembly, his agency is not to be active, but passive. This point was expressly ruled in *The Commonwealth v. Eglee*, where the coverture of the *prochein amy* would have afforded a decisive objection, if she had been considered a party to the deed. That case establishes, also, that the subjection of a *feme covert prochein amy* to her husband's will, is not, in contemplation of law, inconsistent with the free exercise of her will in the execution of her trust; and this, in analogy to the common law, which permits a wife to act in a representative capacity and independent of her husband, wherever the subject-matter is unconnected with his interest or marital rights. The pinch of the case, here, is that the binding was to the husband. But in equity, and even in some instances at the common law, wherever a *feme covert* has power to act as if she were sole, she may treat directly with the husband. As, however, the matter depends on construction, it is urged that expediency requires that the act of assembly be so interpreted as to avoid the tendency to abuse of power which must necessarily exist in every case like the present. That would be a grave consideration, were abuses of the sort without redress. But an effectual corrective is found in the supervising power of the judges, who are bound to discharge wherever the contract is shown to be tainted with actual fraud or collusion; and, in a case like the present, the transaction would be more strictly scanned than if the binding

[The Commonwealth, ex rel. Taylor, v. Leeds.]

were to a stranger. We will not, however, discharge of course, where, as in this case, the covenants appear reasonable and proper on the face of the indenture; especially where the application is not made till the apprentice has ceased to be a burden. It is objected, that the quantum of schooling is unreasonably small. It appears, however, from the apprentice's signature to the indenture, that he wrote a fair hand; and the great object of the binding being to learn the art and mystery of the master, I would hold an indenture valid without any covenant for schooling, at all, if it should appear that the education of the apprentice had been sufficiently attended to before. It therefore appears to a majority of the court, that no reason has yet been shown why the apprentice should not be remanded.

TOD, J., dissented.

Apprentice remanded.

Cited by Counsel, 8 H. 53.

Cited by the Court and followed, 2 R. 271.

[*196]

*[PHILADELPHIA, MARCH 27, 1829.]

Griffith *against* Reford.

IN ERROR.

In an action against the indorser of a promissory note, the drawer, to whom the defendant has executed a release, is not incompetent as a witness for the defendant, on the ground of interest, though he has given to the indorser a judgment and mortgage, to secure him against the indorsement.

But he is incompetent, (on the ground that a witness cannot impeach a writing he has given), to prove that the consideration of the note was usurious; that the indorsee was in fact the lender, and that the security was put into a negotiable form, merely for the sake of convenience.

ON a writ of error to the District Court for the city and county of *Philadelphia*, it appeared from the bills of exceptions returned with the record, that Caleb Griffith, the plaintiff in error, brought this action to recover the amount of four promissory notes, drawn by Thomas L. Plowman in favour of Elizabeth Reford, the defendant, by whom they were indorsed, and also to recover the amount of a bill of exchange, drawn by L. Mansell on J. J. Marshall of Frankford, Kentucky, in favour of Thomas L. Plowman, by whom, as well as by the defendant, it was indorsed.

One of these notes had its origin in a transaction between the plaintiff and the said T. L. Plowman in the year 1803, and another of them originated in a transaction between the same parties in the year 1809. Notes were then given, which were

[Griffith v. Reford.]

renewed from time to time until the year 1819, when the notes upon which the present suit is founded were given.

On the trial of the cause in the District Court, after the notes and bill of exchange above mentioned had been given in evidence by the plaintiff, the defendant offered T. L. Plowman, the drawer of the said notes and the indorser of the bill of exchange, as a witness to prove that the consideration of the notes was usurious, the defendant having, at the bar, given him a release from all liability to her. The counsel for the plaintiff objected to his competency, but the court overruled the objection, and sealed a bill of exceptions.

After having been sworn, the witness stated that he had given a judgment and mortgage to the defendant, to secure her from loss, in consequence of the notes given in evidence. The judgment was entered in the District Court for the city and county of Philadelphia on the 5th of December, 1818. The record of this judgment was then produced by the counsel for the plaintiff, who objected to the further examination of the witness; but the court again overruled the objection, and a second bill of exceptions was tendered and sealed.

The counsel for the plaintiff then objected to the examination of the witness, as to the consideration of any other notes than those which formed the foundation of the suit; but the court overruled the objection, and permitted the witness to give evidence of any *usurious consideration, from the first [*197] note which passed between the parties, up to the notes on which the suit was brought, through their successive renewals. The opinion of the court, in permitting this evidence to be given, was the ground of a third bill of exceptions.

In these several opinions of the court below, error was assigned in this court, where

A. Randall and *J. Randall*, for the plaintiff in error, cited *Chitty on Bills*, 443; *Sterling v. The Marietta and Susquehanna Trading Company*, 11 Serg. & Rawle, 179; *Conrad v. Keyser*, 5 Serg. & Rawle, 370; *Hayes v. Grier*, 4 Binn. 83; *Walton v. Shelley*, 1 T. Rep. 300; 1 New Hamp. Rep. 60; *Kirk*, 166; 3 Mass. Rep. 27; 4 Mass. Rep. 156; 6 Mass. Rep. 499; 7 Mass. Rep. 199; 10 Mass. Rep. 502; 17 Mass. Rep. 94; 3 Johns. Cas. 185; 2 Johns. Rep. 165; 15 Johns. Rep. 270; 17 Johns. Rep. 176; *Stille v. Lynch*, 2 Dall. 194; *Shaw v. Wallis*, 2 Yeates, 17; *Baring v. Shippen*, 2 Binn. 165; *Baird v. Cochran*, 4 Serg. & Rawle, 398; 9 Serg. & Rawle, 229; 2 Hayw. 298; 2 Hawks. 238; 3 Dess. Rep. 223; *Cropper v. Nelson*, 3 Wash. C. C. Rep. 125; 4 Esp. Rep. 11; 10 Mass. Rep. 121; 10 Wheat. 367; *Lewis v. Morgan*, 11 Serg. & Rawle, 234.

[Griffith v. Reford.]

Kittera and Chauncey, for the defendant in error, cited, 7 T. Rep. 62; Starkie on Evid. Pt. 4, 298; Baird v. Cochran, 4 Serg. & Rawle, 398; Baring v. Shippen, 2 Binn. 154, 165; Boyce v. Moore, 2 Dall. 196; 20 Johns. Rep. 285; 16 Johns. 7; 15 Johns. 270; 1 Cra. 194; Blagg v. The Phoenix Ins. Co., 3 Wash. C. C. Rep. 5.

The opinion of the court was delivered by

GIBSON, C. J.—The objection to the witness, on the ground of interest, is not sustained; but, it seems to me, he was incompetent under the rule in *Walton v. Shelley*, to prove that the consideration was usurious. That rule is undoubtedly restricted to paper actually negotiated; and it consequently has no place between the original parties. But how did the case stand when the witness was called? Apparently between an indorser and indorsee; and the question therefore is, not whether the witness was competent to prove the consideration usurious, in a case admitted to be between the original parties, but whether he could, by his own evidence, remove an apparently well founded objection to his own competency; and I take it he could not. If he might make way for his testimony in chief by taking his case out of a rule which *prima facie* furnishes a valid objection to it, he might as well testify in chief in the first instance; for if he were competent for the one purpose, he would necessarily be so for the other. But a witness cannot open his lips for any purpose whatever, while an original objection to his competency remains. It would seem, therefore, that the court erred in admitting the witness exclusively on the credit of his [*198] own evidence, *that the indorsee was in fact the lender, and that the security was put into a negotiable form merely for the sake of convenience.

HUSTON, J.—The plaintiff in error, who was plaintiff below, sued Mrs. Reford, as indorser on four several promissory notes, all dated in 1819, but on different days, and payable at different times. These notes were all drawn by Thomas L. Plowman, payable to Mrs. Reford, and by her indorsed. There was also, by consent, a bill of exchange included in the verdict, about which there was no dispute. The pleas were the general issue, and a special plea of usury, and issue. At the trial of the cause, it was offered to prove, that more than twenty years ago the dealings between Plowman and the plaintiff began in a loan of money by Griffith to Plowman at usurious interest, which money was secured by notes drawn by Plowman and indorsed by the defendant; that the defendant never had any interest in the notes or communication with the plaintiff, but indorsed

[Griffith v. Reford]

at the request and for the accommodation of Plowman, her brother. The loan was originally about seven hundred dollars, and by renewing the notes and including usurious interest, it amounted to about six thousand dollars; that is, to about four thousand dollars more than the debt and legal interest. The notes in question were a renewal of former notes, and the last were for principal and legal interest on those immediately preceding them. Plowman had, in 1818, given his sister, the defendant, a judgment and mortgage to secure her from all responsibility on account of her said indorsements; and she had executed a full release of all claims and demands whatsoever, to that date; and particularly of all claim or demand on account of this suit, &c.

The plaintiff objected to him as a witness, and the court admitted him to prove the whole case. Though divided into three bills of exceptions in the court below, I shall consider the whole together.

The case of *Walton v. Shelley*, was, for the thousandth time, brought up and relied on. It is strange that a case standing alone, supported by no prior and no subsequent decision, should still, once each term, give us employment for a day, more or less. Lord Mansfield brought the principle from the civil law, and engrafted it on the common law, but it never grew. While the judges who decided *Walton v. Shelley* continued on the bench, it had a kind of sickly existence. With them the doctrine *quod nemo allegans suam turpitudinem est audiendus* became extinct, and in the English and in our system, is, I think, in no single instance true. That a person who has made or indorsed a note, and put it in circulation, until it has got into the hands of an innocent holder, shall not prove that it was void before he indorsed or negotiated it, depends, not on that maxim, but on a distinct principle. See 6 Serg. & Rawle, 115, to be cited more fully hereafter.

Notes and bills, in modern times, enter so largely into the transactions of men, that it has been considered necessary to adopt particular *rules as to them,—to give them a sanctity not attending, in all cases, the transfer of other personal [*199] property. Either the ideas of lawyers, and judges too, were vague and confused, or the reporters did not give us really what was said. The interest of commerce never required that counterfeit money should pass current, or that forgery should be protected or encouraged. It did require that he who had passed to an innocent person, for valuable consideration, counterfeit money, or a forged note instead of money, should be held liable for so much good money; and he who had passed such money or note, and was proved to have done so was liable; and his

[Griffith v. Reford.]

indorsing the note being full evidence that he passed it, he was said to be liable on his indorsement, which, in truth, was only the evidence of his liability, which liability depended on general principles of justice; the same which made him liable in the sale of any other article which was not his own, or which was not what he represented it to be. Hence, very soon it was discovered to be absolutely necessary to admit as witnesses, men who had once owned a note, and whose names were on it, to prove facts which rendered it worthless, but which had taken place after such witnesses had parted with it.

The laws forbid gaming, usury, &c.:—the interest of commerce never required the laws of the country to be set at naught, or that criminals should escape punishment; but if a gaming debt or a usurious contract becomes valid when put into the shape of a negotiable note, the law is repealed by the court; and the judges, except in Massachusetts, have not said, that a security declared void in every form, shall be good in one particular form, and that the shortest and most easily adopted.

All paper in the form of negotiable notes is not at all times considered negotiable; for example, a note after it is due; and in every country, I believe, the consideration of a note negotiated after it is due, may be inquired into, and those who indorsed before it was due, are witnesses in any suit on it, if disinterested. See *Cromwell v. Arrott*, 1 Serg. & Rawle, 180, and cases there cited.

Fairness and honesty are as essential to mercantile prosperity, and as important in dealings with mercantile paper, as in any other department of life: hence it was long ago, and still is most clearly held, that the person who claims to recover on mercantile paper, must, if there is any objection to it, show that he is a *bona fide* holder. If he was concerned in giving it a taint, if there is anything unfair or illegal about it, and he was one of those who made it so, he ought not and will not derive any advantage from its being in a negotiable form.

There was a time when counsel in argument, and perhaps judges, talked about a drawer or indorser being a witness for one purpose, and not for every purpose. This seems to be over. A witness in chief, must be sworn, among other things, to tell the whole truth; and, if so sworn, must do so or be perjured, [*200] with the exception of *not telling what will subject himself to criminal prosecution. And, if the matter offered in evidence can be proved by a witness, it can be proved by any witness who is not infamous and not interested.

For the law on this subject of the drawer or indorser of a bill, and maker or indorser of a note, being a witness in a suit on that bill or note, I shall refer to Chitty on Bills, 412, 413, and

[Griffith v. Reford.]

the following pages : and the result is, that in every case where the party offered is disinterested in the event of the cause trying, or equally liable to both parties, he is a witness ; and if liable to costs to one party, a release by that party renders him competent ; and that the drawer or indorser, in a suit against the acceptor, may be a witness for the plaintiff to prove the acceptance, or for the defendant to prove it void, as having been discounted on a usurious consideration ; or that it had been paid ; or that it was not recoverable for any of the causes which would avoid it, if proved by a person through whose hands the note never passed. An act of parliament has been passed, enabling him who holds a note given on a usurious consideration, without notice and for valuable consideration, to recover on it.

In New York they adopted the English rule in broad terms in *Winton v. Saidler*, 3 Johns. Cas. 185. The good sense and profound learning of their judges soon discovered that exceptions were necessary ; and it is now fully settled there, that the maker or indorser of a note may prove any facts which go to show that it ought not to be recovered by a holder who had notice of those facts when he took the note. See 10 Johns. 231 ; *Woodhull v. Holmes*, 15 Johns. 270. In 17 Johns. 176, the above cases are reviewed and sanctioned ; and it is said, if a man puts his own name on a note which is void, and gives it currency, he shall not, as against a *bona fide* holder, be permitted to say it was tainted when it passed from his hands ; but if it receives its taint when it is negotiated to the party plaintiff, by the facts then happening, an indorser whose name is on it, may prove those facts. The witness was the second indorser, and the suit was by the third indorser against the first.

The case in 20 Johns. 285, sanctions all these cases, and decides, that in a suit by the usurious holder against the maker, the payee and indorser is a witness to prove the whole case ; and, further, if a note be made for the purpose of raising money, and it is discounted at a premium higher than the legal rate of interest, and none of the parties whose names are on it could, as between themselves, maintain a suit on it when it became mature, provided it had not been discounted, then such discounting would be usury. And this, and the case in 17 Johns. 176, decide, that if a note, void for usury, is indorsed *bona fide* for good consideration to an innocent person, and the maker of the note take it up, and give a new note, this latter is good ; but if the new note is given to the person who was himself the usurer, to take up a former usurious note or notes, without any new consideration, this last note is equally infected as the first. *A [*201] mere change of security for the same usurious loan, to the party who committed the usury, or to one who had notice of

[Griffith v. Reford.]

it, can never purge the original transaction or give a right to recover. I have said the decisions in Massachusetts are different. 4 Mass. Rep. 157, decides that neither the maker nor indorser is a witness to prove the note void against the indorsee, who was himself the usurer, and plaintiff. The distinction between an innocent holder and a culpable one, though it would seem a very obvious one, did not strike the court. The whole reasoning is on the ground, that the plaintiff is an innocent and *bona fide* holder. "A note," says the judge, "is offered to the merchant or farmer in payment for goods or produce: all he has to do is to look at the names on the note." And again: "It would encourage fraud, by enabling the parties to enjoy the fruits of it, and throw the mischievous consequences of it on an innocent indorsee." And this decision is persisted in, as to usurious notes, up to 10 Mass. Rep. 502; and is the more remarkable, because in 6 Mass. Rep. 430, an indorser is held a witness to prove a fact occurring when the plaintiff received the bill from the witness, showing that he ought not to recover. And again, in *Storer v. Logan*, 9 Mass. Rep. 55, in an action by the indorsee against the drawer, the indorser was admitted to prove, that at the time of indorsing, he communicated certain conditions and restrictions as to his right to draw the bill. Here the difference between the innocent and *bona fide* holder, and one with notice, seems distinctly recognized. In 4 Mass. Rep. 370, the doctrine that an indorsee who has a note to which he knew of objections when he took it, or even if he took it under circumstances which ought to excite suspicion, holds it subject to all exceptions which could be made to it in the hands of the payee, seems to be fully and repeatedly recognized.

I now come to cases in our own courts. In 2 Dall. 92, it is said, "A man may, *bona fide*, purchase any security for the payment of money, at the lowest rate he can, without incurring the penalties of usury."

The rule in New York is, it would seem, or rather, was fully established, though expressed in other words. In *Baird v. Cochran*, 4 Serg. & Rawle, 398, it was decided, that to exclude parties whose names were on the bill, but who were not sued, and not interested, the note must not only be negotiable, but must have been actually negotiated in the usual course of business: in other words, must be in the hands of the plaintiff *bona fide* without notice. This had been before decided in *Cromwell v. Arrott*, 1 Serg. & Rawle, 185, on great consideration, and said in *Baring v. Shippen*. And the very point came up the next year. In *Hepburn v. Cassel*, 6 Serg. & Rawle, 115, Gibson, Justice, (now Chief Justice,) goes into a pretty full consideration of the question, and says, "When, therefore, the contest is

[Griffith v. Reford.]

between the original parties, or between the drawer and a person who has not become the holder by the usual *mercantile indorsement, there is no ground for the application of [*202] the rule." And, again: "The true ground of the rule is policy, which interposes its protection only in favour of third persons, who, in the common course of business, have become the holders of paper strictly negotiable."*

The case of *The Bank of Montgomery v. Walker*, 9 Serg. & Rawle, 229, although a wide range was taken, yet recognizes one ground sufficient for the plaintiff,—that the fact relied on by the defendant was not known to the bank when it gave full consideration for the note, and, the case concludes by stating, without notice had paid the full value. It was decided on the principle that the instrument was negotiable, and negotiated to the bank ignorant of the defence set up. In page 336, Duncan Justice, says, "The rule that a man, whose name is on a note or bill, shall not be a witness, has been restrained here to negotiable instruments, properly so called, and negotiated in the ordinary course of business, before due." And the only grounds on which this part of the case is put, are, that they were liable for costs to the defendant, if a recovery was had against him, and that they did not tell the bank, when they offered the note for discount, what they were offered to prove in court.

In England, New York, Massachusetts, and most other countries, notes given for gaming or usurious considerations are declared void by statute. In this state the security is not declared void, but it is expressly enacted, that no person shall take, for the loan or use of money, more than six per cent. per year, and a penalty is inflicted. It is so well settled in this court, as well as others, that no action can be supported on a contract made in express violation of an act of assembly, that I shall not dwell on that.

Among the rules of most general use and effect, is one, that no court shall give such construction to a statute as to render it nugatory; and a corollary as strong is, that no court can give such application to the rules of practice or of evidence, as to destroy an express legislative enactment.

The discussion of the policy of laws against usury, I shall not meddle with. They exist in all countries where there is a government; and, if no where else, it is enough for me that it is prohibited here. If it were not, this case, presented to any legislative body, would produce a law.

My opinion is, that if the transaction was really a loan on the one side, and a borrowing on the other, more than legal interest cannot be recovered; and it is immaterial whether the security is bill, note, bond, judgment, or mortgage; and that any

[Griffith v. Reford.]

person not infamous, not interested in the event of the cause trying, is a witness to prove any and every part of the case; that the rule of supposed mercantile importance, does not in this, or any other case, apply in favour of a plaintiff who is himself the wrong-doer; and, if it otherwise would apply, I hold that an act of assembly will control and change any rule of evidence or practice; and the application *of this rule, in such cases as [*203] this, annuls the act and makes it inoperative; and I believe all previous decisions in this state warranted the District Court in admitting the evidence, and in their direction to the jury on that evidence.

TOD, J., concurred with HUSTON, J.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 2 Wh. 52; 10 W. 113; 5 W. & S. 28; 7 W. & S. 145; 3 Barr, 299, 384; 9 Barr, 507; 1 H. 48; 3 H. 62; 9 H. 446; 2 C. 512; 6 C. 146; 1 Wright, 497; 6 Wright, 478; 2 G. 362; 2 W. N. C. 485.

Cited by the Court, 1 Miles, 38; 4 Wh. 337, 367; 5 Wh. 575; 2 W. 268; 6 W. 499; 8 W. 309; 4 W. & S. 289; 7 H. 339; 5 Barr, 52; 2 C. 261, 469; 1 Wright, 283.

Affirmed in 5 Wh. 341, and re-affirmed, 3 W. & S. 558. In 8 H. 472, it is said to be no longer an open question.

[PHILADELPHIA, MARCH 27, 1829.]

Cope and Others, trading under the firm of Thomas P.
Cope & Sons, *against* Cordova.

IN ERROR.

The master of a vessel arriving at the port of Philadelphia from a foreign port, is not bound by the bill of lading, to deliver the goods personally to the consignee. The liability of the ship owner ceases when the goods are landed at the usual wharf.

THIS was a writ of error to the Court of Common Pleas of *Philadelphia* county, where the defendant in error, who was plaintiff below, had obtained judgment for fifty-nine dollars and forty-four cents upon the following case stated:—

“The ship *Lancaster*, from *Liverpool*, owned by the defendants, was entered at the custom-house at *Philadelphia*, on the 17th of June, 1824, and commenced unloading on the 21st of the same month. The plaintiff was consignee of ten crates of *Liverpool* ware, part of the cargo of said vessel. All these crates were received by the plaintiff except one, which was known and designated as No. 28.—For the value of this crate, which the plaintiff never received, this action is brought.

[Cope et al., trading under the firm of Thomas P. Cope & Sons, v. Cordova.]

“The ten crates consigned as above to the plaintiff, were entered by him at the custom-house. As soon as the vessel was ready to unload, the plaintiff sent a porter to receive them with a permit, and a list of the articles as specified in his invoice, and an authority to receive them and carry them to his store. The porter delivered the permit to the inspector on board the ship and asked for the plaintiff’s crates. On the 22d June, one or more crates mentioned in his list were received by the plaintiff, and one or more on the two following days. The porter did not attend on the wharf during the whole of those days, but called repeatedly each day and inquired of the inspector for these crates, and took them away as received. No. 28 was landed on the wharf on the 23d June, but was not received by the plaintiff or his porter, and it is unknown to the parties what became of it.

“In unloading a vessel, it is usual as soon as articles of bulk, such as crates, are brought upon deck, to pass them over the side *of the vessel and land them on the wharf. It is [*204] also the practice of the owners to station a clerk upon the wharf, who takes a memorandum of the goods which leave the wharf and the day on which they are taken away, for the information of his employers, in a book called the cargo book. The cargo of the Lancaster was, on this occasion, unloaded in the usual manner; but the cargo book contains no entry in regard to No. 28, except a memorandum from the bill of lading made in the margin, as is usual before beginning to unload, but which has no reference to the actual receipt of the same by the consignee, or on his behalf.

“It is agreed that the value of the crate No. 28, be assessed at fifty-one dollars and fifty-three cents, which includes its proportion of custom-house duties and other expenses, and that the cargo book, plaintiff’s invoice, and bill of lading shall be in evidence.

“Upon these facts, if the court be of opinion that the duty of the defendants required them to see that the said crate, No. 28, after being landed as aforesaid, was received by the plaintiff, their judgment is to be entered for the plaintiff in the sum of fifty-one dollars and fifty-three cents; but, if the court be of opinion that the duty of the defendants did not so require, their judgment is to be entered for the defendants, and the costs are to abide the event of the suit. It is further agreed that the case thus stated be considered as a special verdict, and subject to a writ of error, and that all questions of law be decided under the issue on the present Narr;—whether the evidence shows a case of negligence or conversion.”

[Cope et al., trading under the firm of Thomas P. Cope & Sons, v. Cordova.]

The cause was argued by *Cadwalader* for the plaintiffs in error, and by *H. Melvaine* for the defendant in error.

For the plaintiffs in error, it was said that the decision of the court below could not be supported without requiring of the owners of vessels, whose cargoes are subject to the revenue laws of the United States, the performance of duties such as these laws rendered it impossible to perform. This would appear by considering the effect of the act of congress of the 2d March, 1799, sect. 53, 54, 55, and 56. (1 Story's L. U. S. 619, et seq.)

The special verdict expressly states that the missing crate of hardware was landed on the wharf. It also states that the cargo of this vessel was unloaded according to the usual manner, and it likewise describes the usual mode of unloading. The usage so defined appears to be identical with that of the port of Marseilles, as recognized in a decision of the Admiralty in 1748. (1 Valin, 530.) Similar usages have been sustained in London, in the Turkey trade, (*Drumage v. Jolliffe*, Abbott on Ship. 250, Story's ed. 1829,) and at New York, in our own coasting trade, (*Warren v. Crocheron*, N. Y. Com. Pl., Oct. 26th, 1827, published the following day in the *Statesman*.)

But, independently of usage, and without reference to the law concerning land carriers or coasting traders, who are presumed to be conversant with persons and localities at each end of their [*205] transit, *the question here presented depends upon principles exclusively applicable to the case of vessels arriving from foreign parts. In this point of view the question is one of general law, and must be decided by some rule which we would be content to see reciprocated in its application to the ships of our own countrymen, when abroad. At the season of unlading the master has a variety of duties to perform, which render it impossible for him to hunt out each individual consignee on shore. It is not his business to be conversant with the requisite of such a pursuit. The vessel may perhaps be owned and manned by foreigners, of whom not one is acquainted with so much as the language of the place of arrival. Even in a case like the present, where the ship reaches her home, the master and owner ought not to continue subject to responsibility after they are, to all intents and purposes, deprived of their control over the cargo by the operation of the revenue laws. The consignee, on the other hand, is, or ought to be, familiar with the means proper to be used in order to obtain possession of his own particular consignment. He knows of the shipment through his letter of advice. He also knows when the vessel arrives, or (what is the same thing) he is bound to know it. According to the rules of the law-merchant, he is not excusable for ignorance of her arrival in port. (*Harman v. Clarke*, 4 Campb. 159; Holt

[Cope et al., trading under the firm of Thomas P. Cope & Sons, v. Cordova.] on Ship. 395, ed. 1824.) Upon the ship's arrival, either he takes out a permit or he does not. If he does take one out, he is necessarily reminded to send to the vessel for the articles upon which he pays the duty. If he does not pay the duties, the goods cannot be touched, either by himself or by the ship owner. Both must submit to the act of congress, which provides that the goods shall be carried from the vessel to the custom-house. All this time they remain in the custody of the law. Now it is a fundamental maxim that the act of law shall work no wrong. It would be a very great wrong to continue a man's liability after compulsorily divesting him of all control over the subject of that liability. Upon the strictest rule, a carrier's liability is of necessity at an end when nothing remains to be done by him in his capacity of carrier. The extent of his duties in this respect must vary according to the description of carriage undertaken. Consequently, this case is not to be governed by authorities bearing upon the duties of carriers by land or by inland navigation, or river craft. Among vessels which make sea voyages, some distinction should also be made between those employed in the coasting trade, whose cargoes are not subject to the custom-house regulations, and ships from foreign countries. As to such ships, thus arriving from sea, it is settled law that the liability of their owner or master, as a carrier, is at an end as soon as the thing carried is safely deposited in the usual manner on the usual wharf. (*Hyde v. Trent*, 5 T. R. 339; *Chickering v. Fowler*, 4 Pick. 371; *Abbot*, [Story's ed. of 1829] 249; 1 Valin, 636, 637.)

If the general doctrine were not so clear, the same result might, *in the present case, be fairly contended for [*206] upon a narrower ground. For, inasmuch as the consignee chose to send his own servant to the wharf to receive the goods in question, and thus designated the wharf as the place of delivery, he must be understood to have taken the goods into his own custody, and to have dispensed with any duty of the carrier in this respect, which he might otherwise have claimed to assert (*Sparrow v. Caruthers*, Str. 1236, *Strong v. Nataly*, 4 Bos. & Pul. 16; 5 T. R. 396, per Ashurst, J.)

For the defendant in error the question was stated by his counsel to be, not whether the wharf was the proper place of delivery, as had been contended on the other side, but, whether there had in fact been any delivery at all of the crate in question, to anybody, either at the wharf or elsewhere. *Ostrander v. Brown*, 15 Johns. 38. To deliver the goods he carries is the most important part of the carrier's contract. That the defendants below understood their own duties in this respect appears

[Cope et al., trading under the firm of Thomas P. Cope & Sons, v. Cordova.] from the fact found in the special verdict; that they stationed their clerk upon the wharf, as was their practice, to take an account of the delivery of the cargo in a book specially appropriated to that purpose and no other. This constituted of itself an undertaking, independently of their general duty, to manage and superintend the discharge and delivery of the cargo in all its details. Now the question occurs—What is a delivery? The answer may be found in the definition of a bill of lading, an engagement, which in substance as well as in form, includes a duty to keep the goods until they are received into the actual possession of the consignee, or his assigns. A constructive or imaginary transfer of the possession is no delivery. To hold it to be so would be repugnant to principles which lie at the very foundation of the law of carriers. (*Garnett v. Willan*, 5 Barnw. & Ald. 53; *Duff v. Budd*, 3 Brod. & Bing. 177.) It would be in effect to hold that a carrier would comply with his engagement safely to deliver the merchandise carried, by merely putting it down unprotected upon a wharf, open to the weather and exposed to the pilferer, to remain there over night, unless called for, without even the safeguard of a single watchman. Many actions have been sustained against carriers for delivering goods to the wrong persons. A single such instance would suffice to prove that the carrier is bound either to find the proper person, or at least to keep the goods safely until the proper person comes to take them. As to the authorities cited; to that of Valin and the case in 4 Pickering, 371, we oppose the decision of the Supreme Court of New York in *Ostrander v. Brown*, already cited, and the obvious leaning of Chancellor Kent, twice manifested in his Commentaries, (2 K. Comm. 469; 3 Id. 170.) In the case in 5 T. R. 389, so much pressed upon us, the remarks of the three judges which are relied on by the other side were entirely extrajudicial. These remarks were adapted to a state of things which does not here exist. In England the intervention of wharfingers, who are distinct bailees, [*207] posed between the ship owner and the freighter for the accommodation and security of both, may have introduced there an appropriate principle of decision, which would be utterly inapplicable to the case of vessels discharging their cargoes at the port of Philadelphia.

As to the custom of our port, the special verdict finds that the wharf is the usual place of landing goods as taken from the vessel. Where else could they be landed? How does this prove a custom that when the goods are thus landed, their delivery is complete, or the duties of the carrier in this respect ended? Even though such an inference were deducible, the argument could not avail the carrier. In *Ostrander v. Brown*,

[Cope et al., trading under the firm of Thomas P. Cope & Sons, v. Cordova.] (15 Johns. 39,) the court rejected the evidence offered for the purpose of proving that precisely such an usage prevailed at Albany. The custom of the river Thames has been found and decided upon directly to the point, that the carrier to London is not discharged of his engagement to deliver the goods carried, by landing them upon the usual wharf. (*Wardell v. Mowrillan*, 2 Esp. 603.) Such a custom would be a violent encroachment on the common law; and, moreover, it would be both unreasonable and inconvenient. The discharging of a cargo occupies several days. Each consignee would, upon the doctrine contended for on the other side, be separately put to the same expense and trouble to secure the receipt of his own particular assignment, which if, on the contrary, the duty were devolved upon the carrier, as we contend it ought to be, might, at a comparatively trifling inconvenience be borne by him for the common benefit of all.

The revenue laws do not operate so as to vary the case. When the consignee pays or secures the duties, he receives his permit, and thenceforth deals altogether with the master or owner of the vessel, without reference to the officers of the customs. The act of congress was never intended to interfere with the regular course of dealing between the owner of the ship and the owners of her cargo. The policy of all such enactments is to leave the respective rights of the parties unimpaired, and their duties unaltered; (*Wilson v. Kymmer*, 1 Maule & Selw. 167; *Holt on Ship*. 395-6; *Northey v. Field*, 2 Esp. 613; *Nix v. Olive*, *Abbott on Ship*. 393.) The duties once secured, the goods on board are no longer in the custody of the law. Where the consignee does not take out his permit, the goods may indeed be said to remain in the custody of the law. But, even then, the possession of the law is the possession of the ship owner for all purposes, except the mere collection of the duties, until the actual receipt of the goods by the consignee or on his behalf. The lien for the freight continues even after the goods are warehoused in the custom-house; so the consignor may stop them *in transitu*. This is quite irreconcilable with the idea of their having been delivered.

In reply, the counsel for the plaintiffs in error said that the question, what constitutes the performance of a carrier's contract, *must depend upon principles very different from [*208] those which govern the doctrine of stoppage *in transitu*. The analogy contended for on the other side would not help the case, if pursued in all its consequences. For instance, a delivery of part of the goods carried is, for all the purposes of the law of stoppage *in transitu*, equivalent to a delivery of the whole. Now, while we do not claim the benefit of such an absurdity as the

[Cope et al., trading under the firm of Thomas P. Cope & Sons, v. Cordova.] extension of this rule to the case of a carrier, we also protest against the argument that the termination of the *transitus* for the purpose of stoppage is in all cases to determine the question, whether a carrier's duty is ended. Suppose the goods burnt in the custom-house, is it contended that the ship owner would be answerable? If not, where shall we draw the line? The argument proves too much; since, if good for any thing, it must needs result in these conclusions.

So it is said, that after the goods are landed the carrier has a right to retain (or, more properly, resume) the possession for the purpose of collecting his freight. He undoubtedly has the right, but, like every other right, it may be waived by the party for whose benefit it is exerciseable. Now, suppose he does waive it, is he to continue *volens volens* in possession by construction of law? Surely not. But, on the other hand, suppose he chooses to exercise the right; does it follow that the goods are therefore to remain at all events in his custody as carrier? If, after the carrier's duties are complied with, the thing carried remains in his possession, he does not continue to hold it as carrier, but becomes a bailee of another description. As such, he is not liable for accidental loss, as a carrier would be, and as here contended on the other side. *Garside v. Trent*, 4 T. R. 581; *Webb et al.*, 8 Taunt. 443.

If the object of the cargo book be, as in the case stated, the information only of the ship owner, it cannot operate so as to superinduce or create a liability on his part, which the law would not otherwise recognize. This is a necessary check in his hands upon the officers of the customs, as well as upon those of the vessel. It is a memorandum made to correspond in substance with a part of the entry in the book of the inspector on board prescribed by the act of congress. Without it, the ship owner could not ascertain whether the bills of lading were true or false; whether the goods mentioned in the manifest were, or were not, on board the vessel when she arrived, what progress was making towards completing the unloading, nor could he take proper measures to collect the freight. It would seem that the cargo book in this case contains no entry about the crate in question. But this is immaterial to the decision, because it is expressly found that this crate was actually landed on the wharf, which is all that the law requires.

The definition of the bill of lading should be something more than a bare repetition of the words it contains. Every contract expressed in formal terms must include a designation of the party to whom its performance is promised, and of the party to whose

[*209] *benefit such performance is to inure. By the bill of lading the carrier promises to deliver safely to the con-

[Cope et al., trading under the firm of Thomas P. Cope & Sons, v. Cordova.]
 consignee or his assigns. Then what is a delivery to him or his assigns? The answer is, the depositing the goods carried at their destined port at the usual place of landing them. As to the case in 15 Johns. 39, the report is not very clear upon the fact whether the consignee had had notice of the sloop's arrival at Albany, but the counsel and the court appear to have taken it for granted that he had not had such notice. Now, as this was the case of a coasting vessel, the consignee was entitled to expect notice of her arrival, (4 Pick. 371) although we have seen that it is otherwise with ships from foreign countries. Unless this were the ground of decision, the case may be denied to be law. The most authoritative definitions of the contract of affreightment do not by any means include the alleged essential of an actual manual tradition to the freighter or his agent. The bill of lading has been described as "merely an undertaking to carry from port to port." (5 T. R. 397, per Buller, J., 66.) In Beawes, 114, there is an appropriate definition. He there says of the charter party, "It settles the agreement, as the bill of lading does the contents of the cargo, and binds the master to deliver them well conditioned at the place of discharge, according to the agreement."

The opinion of the court was delivered by

ROGERS, J.—The substance of a bill of lading is a formal acknowledgment of a receipt of goods, and an engagement to deliver them to the consignee or his assigns. And this suit is brought on an alleged breach of such a contract in the non-delivery of a crate of merchandise shipped on board the ship *Lancaster* from Liverpool, and consigned to Raphael Cordova in the usual form. The goods were landed on the wharf of the Liverpool packets, and whether this amounts to a delivery to the consignee is the principal question. It must be conceded, that by the general custom, the liability of ship owners is at an end when the goods are landed at the usual wharf, and this seems to be taken by the whole court as a position not open to dispute in the strongly contested case of *Hyde v. The Trent and Mersey Navigation Company*, 5 T. R. 394; 3 Wilson, 429; 15 Johns. 41; 2 W. Black. 916; 4 T. R. 581.

The usage in France, although not uniform, in every particular, goes to the whole extent of the English doctrine. At Rochelle, when the vessel is moored at the wharf, the merchant freighters, at their own expense and risk, have their merchandise deposited upon the deck of the vessel. From the time when they reach the deck, it is the business of the hands on board to receive and place them in their proper situation. In unlading, the freighters have them taken, in like manner, from

[Cope et al., trading under the firm of Thomas P. Cope & Sons, v. Cordova.]

the deck by their porters, to lower them to the wharf, from which time they are at the merchant's risk, without any liability on the part of the master of the vessel, if they happen to sustain any damage as they are lowered from the vessel. At [*210] *Marseilles, it is the business of the master to put the merchandise on the wharf, after which he is discharged.

1 Valin, 510.

And this rule of the French commercial code is cited, with approbation, by the learned commentator, in page 636 of his Treatise on the Marine Ordonnance. As the master, in conformity with the prevailing usage in this respect, upon his arrival deposits in the custom-house a manifest or general list of the cargo, with a designation of all the individuals to whom each parcel of the merchandise should be respectively delivered, and as there are always officers of the customs who attend to the unloading, to superintend, and make a list of all the merchandise which leaves the vessel, for the purpose of ascertaining whether the manifest of the cargo which has been furnished is accurate and faithful, and by this means the list of these officers constitute a proof of the landing of the merchandise, it is the end of the engagement which the master has contracted by the bill of lading. If then dispute arise, it is only when in the bustle of a hasty discharge mistakes occur on the part of those who convey the merchandise to the warehouses, by introducing articles into one which ought to have gone to another. The error is almost always discovered by ascertaining what parts of the cargo of the vessel have been conveyed to the different warehouses. "But if it happens," says the commentator, "that the error cannot be discovered, the master is always discharged when it appears by the list of the officers of the royal customs that he has caused all the merchandise in his bills of lading to be placed on the wharf." The ordinances of Rochelle and Marseilles are the text from which, in the manner of our own commentators, he proceeds to deduce the general custom. I understand from the observations of the commentator, that the usage is not confined to Rochelle and Marseilles, but that in France, as in Great Britain, it is co-extensive with the limits of the kingdom; and in this country we are not without authority to the same purpose. The usage has been found to prevail in a sister city, as appears from a case the name of which is not now recollected, lately determined by Judge Irving, in New York. The same point has also been ruled by the Supreme Court of Massachusetts, in *Chickering v. Fowler*, 4 Pick. 371. A promise by a master of a vessel to deliver goods to a consignee, does not require that he should deliver them to the consignee personally, or at any particular wharf. It is sufficient, if he

[Cope et al., trading under the firm of Thomas P. Cope & Sons, v. Cordova.]

leaves them at some usual place of unloading, giving notice to the consignee that they are so left.

There is an obvious policy in commercial nations conforming to the usages of each other, and it is also important that there be a uniformity of decisions in our domestic tribunals on mercantile questions. As there will be great convenience in the local usage conforming to the general custom, it will be incumbent on those who maintain the contrary, to make the exception from the rule plainly appear.

In unloading a vessel at the port of Philadelphia, it is usual as *soon as articles of bulk, such as crates, are brought [*211] upon deck, to pass them over the side of the ship, and land them on the wharf. The owners station a clerk on the wharf, who takes a memorandum of the goods, and the day they are taken away, and this for the information of his employers. A manifest or report of the cargo is made by the master, and deposited at the custom-house, and the collector, on the arrival of the vessel within his district, puts and keeps on board one or more inspectors, whose duty it is to examine the contents of the cargo and superintend its delivery. And no goods from a foreign port can be unladen or delivered from the ship in the United States, but in open day, between the rising and setting of the sun, except by special license; nor at any time without a permit from the collector, which is granted to the consignee upon payment of duties or securing them to be paid. The holders of a bill of lading are presumed to be well informed of the probable period of the vessel's arrival, and at any rate such arrival is matter of notoriety in all maritime places. The consignee is previously informed of the shipment, as it is usual for one of the bills of lading to be kept by the merchant, a second is transmitted to the consignee by the post or packet, while the third is sent by the master of the ship together with the goods. With the benefit of all these safeguards, if the consignee uses ordinary diligence, there is as little danger in this country as in England and France, of inconvenience or loss, whereas the risk would be greatly increased if it should be the duty of the ship owner to see to the actual receipt of the goods, and particularly in the case of a general ship with numerous consignments on board, manned altogether by foreigners unacquainted with the language at the port of delivery. I have taken some pains to ascertain the opinion and practice of merchants of the city on this question, which is one of general concern. My inquiries have resulted in this, that the goods, when landed, have heretofore been considered at the risk of the consignee, and that the general understanding has been that the liability of the ship owner ceases upon the landing of the goods at the usual wharf.

[Cope et al., trading under the firm of Thomas P. Cope & Sons, v. Cordova.]

I see no reason to depart from a rule which has received such repeated sanctions, from which no inconvenience has heretofore resulted, and which it is believed in practice has conduced to the general welfare.

If the special verdict had found a uniform usage in the one way or the other, we should have held ourselves bound by the custom; for I fully accede to the principle, that the mode of delivery is regulated by the practice of the place. The contract is supposed to be made in reference to the usage at the port of delivery. But if no usage had been found, we hold it to be equally clear, that we should be governed by the general custom.

The case finds that the consignee obtained a permit for the landing of the goods, that they were landed on the wharf, that he was aware the master was employed in discharging his cargo, and that the consignee sent his own porter to receive and take [*212] them away; *that he inquired for them, but did not receive them. If, under such circumstances the goods were lost, it was in consequence of his own negligence or his servant's. It was the duty of the porter, instead of merely inquiring, to stay till he had actually received the goods.

It is beside the question to say that perishable articles may be landed, at improper times, to the great damage of the consignee. When such special cases arise, they will be decided on their own circumstances. This goes on the ground that the master has acted with good faith, and in the usual manner, and in such case it is the opinion of the court that the ship owners are discharged.

We would wish to be understood as giving no opinion on the law which regulates the internal or coasting trade, to which I understand the case of *Ostrander v. Brown and Stafford*, 15 Johns. 39, to apply. We do not consider this decision as interfering with the principles of that case.

Judgment reversed, and judgment for the defendants below upon the case stated.

Cited by Counsel, 6 Wh. 515; 6 W. & S. 64; 10 S. 114; 26 S. 413; s. c. 1 W. N. C. 78; 14 N. 353.

Cited by Court, 5 W. & S. 128.

As intimated in the dictum at the end of the above decision, the rule there laid down does not apply to domestic commerce. A carrier must in such case either actually deliver the goods, or, if so stipulated in the bill of lading, give proper notice to the consignee, and in the meantime hold them as a warehouseman. An express company, however, should actually deliver goods: *American Express Co. v. Robinson*, 22 S. 274. The rule as stated is sustained by the following cases. The responsibility of a carrier upon the Ohio River, does not cease on depositing goods on the wharf and notice given to the consignee: *Hemphill v. Chenie*, 6 W. & S. 62. A railroad is not discharged from liability by tendering delivery at an improper time (Saturday evening): *Eagle v. White*,

[Cope et al., trading under the firm of Thomas P. Cope & Sons, v. Cordova.] 6 Wh. 505; and whether the time was proper is for the jury: *Hill v. Humphreys*, 5 W. & S. 123. Where the bill of lading provides that notice will be given, the carrier after such notice is liable only as a warehouseman: *Shenk v. Phila. Steam Propeller Co.* 10 S. 109; *McCarty v. N. Y. & E. R. R.*, 6 C. 247. Where delivery is expressly promised the company is liable for not delivering: *Penna. R. R. v. Mitchell*, 4 W. N. C. 3. And where delivery is attempted it must be to the right party: *Shenk v. Propeller Co.*, *supra*, unless the goods have been improperly directed: *Lake Shore R. R. v. Hodapp*, 2 N. 22.

[PHILADELPHIA, MARCH 27, 1829.]

Caldwell, Administrator of Caldwell, Surviving Partner
of Holmes, *against* Stileman.

IN ERROR.

Though, in an action against the representatives of a deceased partner, the evidence of the insolvency of the surviving partner be not satisfactorily proved, yet if it be sworn to, and the defendant demur to the evidence, it must be taken as proved.

If a contract be made with a firm, to do a certain piece of work, which is not finished until after the death of one of the partners, the estate of that partner is liable, provided the surviving partner be insolvent.

Though on a demurrer to evidence, judgment will not be given if the declaration set forth an illegal cause of action, or no cause of action, yet it waives all objections merely formal; and what would be cured by a verdict, is cured by a demurrer to evidence.

WRIT of error to the District Court for the city and county of *Philadelphia*.

Richard Stileman, the defendant in error and plaintiff below, brought this action against John Caldwell, administrator of Alexander Caldwell, deceased, who in his lifetime, traded in partnership with John Holmes, under the firm of Holmes & Caldwell.

The suit was brought to March Term, 1825, and the declaration, which contained an averment of the insolvency of John Holmes, was for work and labour done and performed for the firm of Holmes & Caldwell, in the lifetime of the said Alexander Caldwell. The plaintiff claimed the sum of one hundred and seventy dollars *and thirteen cents, which included [*213] work done and delivered before the death of Alexander Caldwell, as well as work done and delivered to John Holmes, after the death of Caldwell.

The case, as disclosed by the evidence given at the trial, was briefly as follows:—

In the autumn of the year 1824, Holmes and Caldwell entered into partnership in the business of making machinery for manufactories of cotton and wool. They made an agreement

[Caldwell, Administrator of Caldwell, surviving partner of Holmes and Caldwell, *v.* Stileman.]

with Richard Stileman, the plaintiff below, who was a blacksmith, to make all the iron work for their machinery, for twelve and a half cents per pound. About the 14th of September, 1824, Holmes and Caldwell, entered into a contract with Bernard M'Credy to make for him a stretcher, which was to be finished in six weeks or two months, and in case of delay in delivering the work, a penalty was imposed by the agreement. Stileman was employed to do the iron work for the stretcher. It was proved by one witness, that Caldwell went to Stileman, and urged that the shafts, &c., of a horse mill should go on as quickly as possible, as he wanted him to go to work at the stretcher; and M'Credy testified that Caldwell told him he had employed Stileman to do the iron work for the stretcher. Part of the work for the horse mill was sent to Holmes and Caldwell's manufactory in the lifetime of Caldwell. None of the work for the stretcher was sent there until after his death, nor was there any proof that Stileman had begun to work at it when Caldwell died. From his own books it seemed that he had not. Caldwell died on the 6th of October, 1824, and Stileman knew of his death.

Holmes carried on the business for sometime after the decease of Caldwell, and gave Stileman an order on M'Credy, dated the 17th November, 1826, to pay him for the iron work of the stretcher, made by Holmes and Caldwell. This order M'Credy refused to accept, because it was not signed by Holmes, as surviving partner. He offered to accept it if this were done, but it was not done. It was sworn by one witness that Holmes became insolvent soon after Caldwell's death; and by another, (M'Credy,) that he made an assignment, but at what time, was not stated. M'Credy paid the assignees for the stretcher.

It appeared from the record, that on the 15th of February, 1825, Holmes gave bond to appear at the next court, &c., to take the benefit of the insolvent laws.

From Stileman's books, which were given in evidence, it appeared that the work for the horse mill was begun on the 13th of September, 1824, and finished on the 20th of November, 1824. It amounted, in the whole, to eighty dollars and thirty-seven and a half cents. On a different page was an entry of iron work for M'Credy, to the amount of ninety-four dollars and eighty cents, beginning on the 13th of October, and ending on [*214] the 13th of December, *1824. In another page, what was called the "Jobbing Account," beginning on the 17th of September, and ending on the 20th of October, 1824, amounting to thirty dollars and ninety-three cents, was charged to John Holmes. In another page, another account to the

[Caldwell, Administrator of Caldwell, surviving partner of Holmes and Caldwell, v. Stileman.]

amount of five dollars and thirty-six cents, beginning on the 21st of December, 1824, and ending on the 10th of January, 1825, was also charged to him. Credits were entered on the 5th of November, 1824, and at sundry times afterwards, to the amount of forty dollars and sixty three and a half cents.

When the plaintiff had closed his case, the defendant demurred to the evidence. The plaintiff joined in the demurrer; and the jury assessed damages, conditionally, for the whole of the plaintiff's demand. The court below gave judgment for the plaintiff.

In this court, the following specifications of error were filed :

First. Because there is not in the evidence demurred to, such proof of the insolvency of John Holmes, the surviving partner, as to entitle the plaintiff to maintain his suit against the administrator of the deceased partner, at the time and in the manner the suit is brought.

Second. Because the dealings of the plaintiff with John Holmes, the surviving partner, after the death of Alexander Caldwell, in doing new work and delivering to him work contracted to be done before the death of Alexander Caldwell, form a bar to the present suit.

Third. Because, under the declaration filed and issue joined, the plaintiff cannot recover for any work done and performed after the death of Alexander Caldwell.

Bradford, for the plaintiff in error.

1. The evidence of the insolvency of the surviving partner was not sufficient. He had made a general assignment and given bond for the purpose of taking the benefit of the insolvent laws, but he does not appear ever to have carried that purpose into execution. This is not sufficient evidence of insolvency to maintain an action against the surviving partner. It is settled in Pennsylvania and in England, that where the surviving partner is insolvent, the creditor has a remedy against the representatives of the deceased partner; but the insolvency required must be actual, positive, and legal. It must be averred and proved, that he has been discharged by an insolvent or bankrupt law. The creditor has no equitable remedy against the representatives of the deceased partner, until he has exhausted all legal remedies against the survivor. *Lessee of Ross v. Eason*, 4 Yeates, 54; *Duerhagen v. The United States Ins. Co.*, 2 Serg. & Rawle, 185; *Lessee of Maus v. Montgomery*, 11 Serg. & Rawle, 329; *Bank of the United States v. Smith*, 11 Wheat. 171; 15 Johns. 57; *Heath v. Percival*, 1 P. Wms. 682; *Storer*

[Caldwell, Administrator of Caldwell, surviving partner of Holmes and Caldwell, *v.* Stileman.]

v. Herncliff, Conn. Rep. 147; Daniel *v.* Cross, 3 Ves. Jr. 277; Gray *v.* Chiswell, 9 Ves. Jr. 125; Van Reimsdyke *v.* Kane, 1 [*215] *Gall. 385; Lang *v.* Keppele, 1 Binn. 123; Marshall *v.* De Groot, 1 Caines' Ca. in Er. 122; Lewis *v.* Culbertson, 11 Serg. & Rawle, 48.

2. The dealing between the plaintiff and Holmes after the death of Caldwell formed a separate contract, under which the representatives of the deceased partner could not be charged. The general agreement to work at a given rate, was rescinded by the dissolution of the partnership, which was the consequence of the death of one of the partners, except as to work actually begun under that contract.

3. The declaration being only for work done before the decease of Caldwell, no judgment could properly be given for what was performed after that event.

Dallas, for the defendant in error, (who, on the first point, was stopped by the court,) answered, that the contract with the plaintiff was entire, and could not be divided. It related to the iron work of all jobs that were to be finished by the firm after the death of one of the partners. He was to be the smith of the firm, so long as it had such work to do. The work was in progress, and part of it executed before the death of the deceased partner. He cited 2 Powell on Cont. 56; Gow on Part. 437, 440, 460; Hammersly *v.* Lambert, 2 Johns. Ch. Rep. 508; Daniel *v.* Cross, 3 Ves. Jr. 279.

HUSTON, J., (after stating the facts,) delivered the opinion of the court, as follows :

1. As to the insolvency of Holmes, the proof is not very satisfactory. But one witness says, he became insolvent; another, that he assigned, and the record showed that he had applied for the benefit of the insolvent acts. This suit was instituted by writ returnable to the term at which he was to be heard as an insolvent. The narr states; that he had become insolvent, and was totally unable to pay, &c.—issue might have been taken on this.

The evidence, as offered, might some of it, have been objected to, but was not. Instead of parol evidence that he assigned, the assignment must have been produced. A bill of exceptions to evidence offered, brings up the question of the legality and competency of the evidence. If the evidence is admitted without objection, and there is a demurrer to it, this admits that the evidence was legal, competent, and true, and brings up only

[Caldwell, Administrator of Caldwell, surviving partner of Holmes and Caldwell, *v.* Stileman.]

the effect of it on the right; every fact sworn to, or shown by written documents, is admitted to be true; and every fair inference from what is given in evidence, is to be taken as proved. Now, it was expressly sworn that he was insolvent. It was truly said by the late Chief Justice, that he who demurs to evidence, has an up-hill business of it.

I admit fully, that before the estate of a deceased partner can be made liable, it ought to appear that the surviving partner was unable *to pay, and I would not advise a verdict [*216] for the plaintiff, until he had given pretty full evidence of it. I think a jury ought to presume against inconclusive and defective proof, if fuller and more satisfactory evidence was possible. The representatives of a deceased partner cannot meddle with partnership property, or collect the credits, until the debts are paid. The fund is by law appropriated to creditors of the firm, and they ought to show that it is exhausted before they resort to the individual estate of a deceased partner.

But in this case we must take it to have been proved.

2. A partnership may be dissolved by the parties themselves, or in some cases by one of them—by the bankruptcy of one, or by the death of one. There is, in some respects, a difference as to the effect of a dissolution in the different ways. We have here to consider only of one, a dissolution by the death of a partner; and this of itself works a dissolution, and so entirely, that want of notice of it does not have the effect of making the estate liable to debts contracted by surviving partners, or for their misconduct. This has been complained of, reconsidered, and I consider it settled, and rightly settled; but, from the nature of the transactions of men, and from the uncertainty of the time when one may die, (or the partnership be dissolved in some other way,) contracts may be made, and engagements entered into, which are not complied with at the dissolution; and, for the purpose of making good these engagements, the partnership must have a legal continuance, though determined as between themselves, for every other purpose. Under what particular circumstances and by what particular engagements it will be so continued, and to what effect, even after the death of one partner, is not easy to define. The wisest judges have not been able to establish any universal rule; and the more there is known of the business of this life and the diversity of engagements, so much more strongly will the difficulty of any general rule without exception, strike the mind.

As to a specific contract to do a particular thing, there is no

[Caldwell, Administrator of Caldwell, surviving partner of Holmes and Caldwell, v. Stileman.]

difficulty. I incline to think that generally, a continuing agreement, to do all work of a certain description, to deliver all flour, or whiskey, or cotton, or tobacco, &c., &c., is not within the rule, for if it were, the survivors could continue the partnership as long as they could get the old hands to work, or old customers to continue dealing; in such cases all work done on orders not given in the lifetime of the deceased—all articles delivered after his death must generally be considered as chargeable to the survivors only. The interest of the deceased is fixed by the state of affairs at his death, or at most, when contracts, at his death, are completed. An agreement to do a particular job, may bind the estate of the deceased, but not an agreement to do all work, all jobs, at the same rate. This would keep the estate of the deceased liable for years. If it cannot be held liable for years, we can fix no time except death, and engagements *then specific. In this case the evidence is, that [217] Caldwell, in his lifetime intimated to Stileman, he was to do this work; at another time he urged him to expedite the work of the horse mill, that he might begin this; and he told McCredy, Stileman was to do it. There was no error in including this in the verdict. The horse mill was clearly begun in Caldwell's lifetime: as to the job work, this is before us uncertain. The extract from the books is so short, we do not see it as fully as the court and jury who had the books—it is all charged to J. Holmes. We have no evidence that any of it was ever chargeable to the firm, or is now chargeable on defendant; but the credits would seem to be all entered to this account, and exceed the debits. There is then, no injury to the plaintiff in error by taking in this.

3. The third objection remains to be considered. It is true that on this declaration the plaintiff could not have given evidence of work done after Caldwell's death, but it was permitted to be given without objection. It was then contended that in no event was Caldwell's estate liable for this: it was found that for work contracted for in his lifetime, his estate is liable, and then exception is taken that the *allegata* and *probata* do not agree. It is too late. I do not say that on a demurrer to evidence we will so far disregard the pleadings as to give judgment when the narr states no cause of action, or an illegal cause. But, I do say, and all the cases warrant me in saying, that it waives all objections merely formal, and what would be cured by a verdict is waived by a demurrer to evidence. What is contended for here would make it a demurrer to the narr, a bill of exceptions to testimony, a motion for a new trial, and a motion in arrest of

[Caldwell, Administrator of Caldwell, surviving partner of Holmes and Caldwell, v. Stileman.]

judgment. Now, it is neither of the three first, and after a decision of court on the law, as arising on the facts, it can never be the last, except as I said, in case of a total and radical defect.

Judgment affirmed.

Cited by Counsel, 1 Penn. R. 201; 3 Wh. 391; 3 W. 486; 5 W. & S. 214, 337; 10 Barr, 124; 3 G. 92.

*[PHILADELPHIA, MARCH 27, 1829.]

[*218]

Butz against Ihrie.

Time does not begin to run against a privilege reserved in a deed, until some default, negligence, or acquiescence is shown, or may be fairly presumed, in the party in whose favour such reservation is made.

Therefore a reservation of a right for the grantor his heirs and assigns, to raise, swell and dam the water of a stream, from a dam intended to be built on his own land, provided the same is not raised or swelled so high as to injure and damage the mill granted by the deed, is not barred, forfeited, or lost by the lapse of thirty-two years, from the time the right was reserved, to the time of building the dam, in pursuance of that right.

An injury to the grantor's mill-race, is an injury to his mill, for which he is entitled to damages.

Though the words of the deed be "a dam," &c., yet the substance of the reservation is of a privilege to overflow the land, without injuring the grantor's mill, and whether this be done by one dam or by more than one, is not essential.

THIS case came on for trial before the Chief Justice in the Circuit Court of *Northampton* county, at Easton, on the 11th of April, 1828.

The action was originally instituted in the Court of Common Pleas, of *Northampton* county, on the 8th of November, 1826, by David Butz, and Daniel W. Butz, against Peter Ihrie, the elder, to recover damages for a nuisance caused by the defendant in the erection of a division dam, which, it was alleged, made the waters of the Bushkiln creek flow back upon the land of the plaintiffs, and injure their saw-mill, and grist-mill. On the 15th of January, 1827, the cause was removed by the plaintiffs into the Circuit Court. David Butz subsequently died before the declaration was filed.

The plaintiff's mills are situate on the Bushkiln creek, not far from its junction with the river Delaware. The nearest mill to the mouth of the creek is on its north bank, and belongs to Mr. Mixell. On the south bank, a few rods farther up, is the oil-mill of Peter Ihrie, the defendant; a few rods farther is the division dam, the subject of the present controversy. This division dam is a permanent fixture placed in the bed of the creek,

Butz v. Ihrie.

and extending from bank to bank. It consists of a log laid upon a solid foundation, and a plank eight and a half inches wide erected on the log. Over this the whole volume of the stream must pass, whether the water be high or low. This dam is but a short distance below the line of the plaintiff's land. Farther up the creek, on its north bank, a few rods from the division dam, is the plaintiff's saw-mill. Above the saw-mill, is the mouth of the tail-race appurtenant to the grist-mill, which is situate still farther up the creek, on its north bank.

The plaintiff, on the trial, after having proved possession of the mills, gave evidence of the erection of the division dam, by the defendant in the year 1825, and that the effect of it was, to [*219] cause *the waters of the creek to flow back over the plaintiff's line, and into the tail-race of his grist-mill. The back water, it was proved, came much sooner into the tail-race of the plaintiff's grist-mill since the laying of the plank which formed part of the division dam than it did before; and one witness testified that he had measured from two, three, four, to ten inches of back water on the sheeting when there was a rise in the creek. The plaintiff's saw-mill was built from twenty-eight to thirty years before the trial of the cause, and the grist-mill before the Revolution. A great deal of evidence was given relative to the backing of the water, which it is not necessary now to state: one witness swore that he would not give as much for the grist-mill with the back water on, as if it were off.

The defendant gave in evidence a deed, dated April 2d, 1792, between the executors of Peter Koechline of the one part, and Jacob Koechline and Peter Ihrie of the other part, which embraced the premises of both the plaintiff and defendant; also a deed dated 12th of April, 1793, by Jacob Koechline and wife, and Peter Ihrie and wife, to James Ralston and John Mulhallon, for the premises now the property of the plaintiff. This deed contained an exception or reservation in these words, viz.: "excepting and reserving therefrom to the said Jacob Koechline and Peter Ihrie, their heirs and assigns, tenants and occupiers, possessing and holding a certain lot or piece of ground situate on Bushkiln creek, aforesaid, below and adjoining the hereby granted premises commonly known by the name of 'the fulling mill tract,' the full, free, and absolute right and privilege to raise, swell, and dam the water in the said creek from a dam intended to be built on the said fulling mill tract upon the premises hereby granted, provided the same is not raised or swelled so high as to injure the grist-mill hereby conveyed."

On the 9th of December, 1793, a deed of partition was executed between Jacob Koechline and wife, and Peter Ihrie, by which as well the tract described in the above exception, as

[Butz v. Ihrie.]

“below and adjoining” the plaintiff’s tract, as the water power belonging to it, was divided between the parties. The portion of water allotted to Jacob Koechline, was that afterwards used for the purposes of Jacob Mixell’s mill, already mentioned; and the professed object of the division dam now complained of, was to divide the water between Mixell’s and Ihrie’s mills.

It appeared, from the evidence given by the defendant on the trial, that he had, thirty years before, purchased planks to be used in the erection of a mill: That the old works erected near the site of the defendant’s present oil-mill, and which were used for the purpose of making oil and fulling cloth, went to decay, after the year 1776: That the dam then erected did not swell the water to the tail-race of the grist-mill, now the property of the plaintiff, which was erected twenty years before the Revolution, and *that nothing had been built on the site of the [*220] old fulling-mill until the defendant erected his present oil-mill. Much evidence was likewise given on the part of the defendant, as to the extent of the back water, and other matters, a detail of which is not now material.

At the close of the trial his Honour, the Chief Justice, delivered to the jury the following:—

CHARGE.—There is a preliminary objection to the form of the action. It is said, that these plaintiffs had separated their interests, and that they could not recover jointly. I think differently. At law, they were still tenants in common, and may therefore join in a common law action, for an injury to their possession, and divide the damages, if they obtain any, according to their equitable rights.

There is, certainly, evidence that the defendants have flooded the plaintiff’s land; but the defendant says he has a right to do so, provided he does not injure the mill; and for this he refers to a reservation in a deed under the parties to which, both sides respectively claim. The plaintiffs say, the defendant has lost the benefit of the privilege, by not having exercised it from the 2d of April, 1793, till August, 1825, thirty-two years. There has been no use of the water adverse to this privilege, and the question, therefore, is not one in analogy to the statute of limitations. The inquiry is, whether the lapse of time is sufficient to presume a release? I think it is too short. It has been left to a jury to presume an ouster after thirty-eight years against a tenant in common, and this is the very shortest period ever known. I am unwilling to narrow it.

This is not like a case where a man backs the water to his own line; in which case he will not be answerable for the increased rise of the water in freshets. In that case the law gives him a right to do so, without conditions, or restrictions. But that is

[Butz v. Ihrie.]

very different from a case where a privilege is granted on specific conditions and restrictions.

The inquiry then is, whether the defendant has flooded the land of the plaintiffs, so as to injure the mill, in any way at all, as it then stood, whether in high or low water? If the mill has received any injury, the plaintiffs are entitled to damages; if it has not been injured, they are entitled to none. The matter, therefore, comes to a question of fact. As you have not only heard the evidence, but viewed the premises, you are quite as competent to pass on it as I can be. The cause, therefore, is submitted to you, under this direction, for your consideration of the matter of fact exclusively.

The jury found a verdict for the defendant, and the plaintiffs' counsel moved for a new trial, for which they filed several reasons. The motion having been overruled, an appeal was entered to the court in bank. The points chiefly discussed in the argument, are sufficiently stated in the opinion of the court.

Scott and Binney, for the plaintiffs, cited, 2 Saund. 175, note; [*221] *1 Vern. 32, 196; 2 Pothier, 128; 2 Brown's Rep. 29; Strickler v. Todd, 10 Serg. & Rawle, 69; Kingston v. Lesley, 10 Serg. & Rawle, 383; Norris's Peake, 499, note; Jackson v. Hudson, 3 Johns. Rep. 387; Com. Dig. Fait. E. 290; Cro. Jac. 121; Blaine's Lessee v. Chambers, 1 Serg. & Rawle, 169; Angell on Adv. Enjoyment, 24, 63, 68; Angell on Water Courses, 45; 1 Phil. Evid. 124; Winchelsea Causes, 4 Burr. 1962; 12 Mass. Rep. 157.

J. M. Porter, and *Tilghman*, contra, referred to Angell on Adv. Enjoyment, 55, 64; 2 Com. Rep. 584; 1 Com. Rep. 382; 7 Wheat. 59; 1 Pick. Rep. 466; 14 Mass. Rep. 55; 9 Serg. & Rawle, 26; 13 Mass. Rep. 614; 4 Dall. 244; 1 Journ. of Jurisp. 256; 3 Salk. 278.

The opinion of the court was delivered by

TODD, J.—It is the unanimous opinion of the court to affirm the judgment. The question chiefly argued by the counsel has been, whether the case is affected by the act of limitations, or by analogy to it?

The plaintiff alleges an injury by a dam erected by the defendant in a stream, called the Bushkiln, throwing the water upon his, the plaintiff's land, and injuring his grist-mill. The defendant insisted that when the suit was brought, no water at all had been raised upon the plaintiff's property by means of the dam; he admits that, after the suit was brought, the water had been thrown by the dam upon the plaintiff's land, but not

[Butz v. Ihrie.]

so as to hurt the plaintiff's mill, and that the dam was lawfully erected by virtue of a reservation in a deed, dated 12th of April, 1793, from Jacob Koechline and Peter Ihrie, to James Ralston and John Mulhallon, in these words: "excepting and reserving therefrom, to the said Jacob Koechline and Peter Ihrie, their heirs or assigns, tenants and occupiers, possessing and holding a certain lot or piece of ground, situate on Bushkilm creek, aforesaid, below and adjoining the hereby granted premises, commonly known by the name of 'the fulling-mill tract,' the full, free, and absolute right and privilege to raise, swell, and dam the water in the said creek, from a dam intended to be built on the said fulling-mill tract, upon the premises hereby granted; provided the same is not raised or swelled so high as to injure and damage the grist-mill hereby conveyed."

The grist-mill mentioned in the reservation is the plaintiff's mill in question. The reservation is admitted to be valid, unless affected by lapse of time. But the deed being dated in 1793, and the dam complained of not being erected until 1825, and there thus being a space of thirty-two years between the reservation of the right, and the building of the dam in alleged pursuance of that right, the argument by the plaintiff's counsel is, that the privilege reserved having been abandoned or neglected for twenty-one years *and more, is thereby lost; and [*222] that a release or some other extinguishment, ought to be presumed, from mere length of time, by the act of limitations, or the legal analogy to it. They argue, that here are eleven years over and above the time necessary either to create and confirm by possession an incorporeal right, or to forfeit and extinguish any privilege, such as that claimed by the defendant in this case, by non-user and laches.

We are all of opinion, that the lapse of time has not been such as to create any bar or forfeiture, and that under the circumstances of this case the privilege reserved in the deed of 1793, was in full force in 1825, unaffected by any prescription. The omission to erect the dam can scarcely in this case be called a non-user. Certainly it cannot be called laches. It would have been otherwise, had the deed shown that an immediate exercise of the privilege reserved was contemplated by the parties. Here the right of building the dam appears to be expressly reserved, even to the heirs and assigns of the grantors in the deed. We concur in the opinion of the Chief Justice expressed to the jury, that the law of limitations may be applicable to a case of this kind; but that the time cannot begin to run against such a privilege by reservation, until some default, negligence, or acquiescence is shown, or may be fairly presumed in the owner. The time of limitation may begin to run as soon as the laches

[*Butz v. Ihrie.*]

exist, but not before—no more than on a bond or promise to save harmless, will the limitation begin to run, before the damage happens: it not being the date of the contract or grant that is material in these cases, but the time of performance.

The plaintiff's counsel have presented one very important question, which, I apprehend, cannot be directly decided, because it does not appear to have been presented to the court below, nor mentioned. It is, whether the dam in question, not being an ordinary mill-dam, but erected for the mere purpose of dividing the water between the mills on the different sides of the island, thus causing a perpetual swell of water on the plaintiff's land, can be authorized by the reservation in the deed of 1793? It seems to be a question which depends on sundry matters, such as the nature of the stream, usage, necessity. If, in point of fact, the dividing dam is necessary to the full, just, and proper enjoyment of the water power, then, in my opinion, the erection of such dam is justifiable under the reservation.

We all agree with the plaintiff's counsel most entirely, that, according to the just intent and meaning of the proviso in the reservation, an injury to the plaintiff's mill-race is an injury to his mill. There can be no doubt upon the matter. Any impediment in the stream caused by the defendant's dam, by which the plaintiff's mill is stopped from grinding in any state of the water, or made to grind slower, or worse than it otherwise would, is an injury for which the plaintiff would be entitled to damages [*223] in this case, notwithstanding the reservation is yet in full force. If the damage was to the land only, and not to the mill, the plaintiff was not entitled to recover. And, in substance, the Chief Justice so charged the jury.

The mere number of dams we do not think to be material; though the words of the deed are "a dam," &c., yet the substance of the reservation is of a privilege to overflow the land, not injuring the mill. Whether this is done by one dam, or more than one, erected on the defendant's land, appears unessential. This applies not to the dividing dam. Whether that is illegal or not, seems to depend on other matters already mentioned.

Judgment affirmed.

Cited by Counsel, 3 R. 90; 5 Wh. 594; 7 W. & S. 155; 4 Barr, 484; 2 J. 250; 11 H. 108; 8 C. 405; 9 C. 171; 3 S. 235; 19 S. 218; 8 N. 228.

Cited by the Court, 3 R. 82; 2 Wh. 130; 4 W. 231; 8 W. 439; 1 N. 209.

[PHILADELPHIA, MARCH 27, 1829.]

Arnold and Another, *against* Gorr and Another.

A difference between the sheriff's deed, and the levy, *venditioni exponas* and conditions of sale, in stating the number of acres contained in a tract of land, is unimportant.

Though the conditions of sale are not essential to support an ejectment by the sheriff's vendee, yet being part of the *res gesta*, they are admissible in evidence.

An ancient deed, which has not accompanied the possession, is not admissible in evidence without proof of its execution.

The record of a judgment, sheriff's sale thereon, sheriff's deed, and mesne conveyances to the party offering them, are not evidence, where no interest in the land sold by the sheriff, is shown in the defendant in the judgment.

A defendant whose property has been sold by the sheriff, cannot defeat the purchaser in obtaining possession, by connecting himself with one who may have a good title.

A judgment was confessed before a justice of the peace on the 11th of August, 1823, for a sum exceeding one hundred dollars. A transcript of this judgment was filed in the Court of Common Pleas, on the 20th of the same month. The plaintiff afterwards took out an execution from the justice, which was returned—"No goods could be found to satisfy the demand;" a certificate to which effect was carried to the prothonotary's office, together with a *præcipe* for a *fiery facias*, on the 7th of April, 1824. The prothonotary, instead of filing this certificate with the transcript already filed, filed and docketed it as a new transcript, and marked the execution as having issued upon it. Held, that all these proceedings must be taken together, as constituting one whole, and that, therefore, they were regular. But if they were not so, they could not be inquired into collaterally, the remedy being, if any error actually existed, by motion to the Common Pleas, before the sheriff's deed is acknowledged; and it makes no difference whether the purchaser at sheriff's sale is the plaintiff in the execution or a stranger.

THIS ejectment, in which John Arnold and John Miller were plaintiffs, and Jacob Gorr and Garbutt Fisher, defendants, was tried at the Circuit Court of *Northampton* county, on the 8th of April, 1828, before the Chief Justice, under whose direction the jury found a verdict for the plaintiffs.

*The defendants moved for a new trial, and in arrest of judgment, and filed several reasons in support of each [*224] motion, both of which were overruled by the court; whereupon an appeal was entered.

In this court the cause was argued by *Scott* and *Binney*, for the appellants, who cited *Yelv.* 179, 180; *Lessee of Samms v. Alexander*, 3 *Yeates*, 268; *Hawk v. Stouch*, 5 *Serg. & Rawle*, 161; *Bull. N. P.* 255; 1 *Phil. Ev.* 404, 405, 406, (note); *Jackson v. Blanshan*, 3 *Johns. Rep.* 295; *Lessee of Thomas v. Horlocker*, 1 *Dall.* 14; 1 *Inst.* 6, b; *Healy v. Moul*, 5 *Serg. & Rawle*,

[Arnold and another v. Gorr and another.]

184; M'Gennis v. Allison, 10 Serg. & Rawle, 198; Smith v. Painter, 5 Serg. & Rawle, 225; Freedly v. Sheetz, 9 Serg. & Rawle, 156; Simpson v. Jack, 13 Serg. & Rawle, 278; Lenox v. M'Call, 3 Serg. & Rawle, 102; 4 Mass. Rep. 641; Powers v. The People, 4 Johns. Rep. 292; Alberty v. Dawson, 1 Binn. 105; Thomas v. Culp, 4 Serg. & Rawle, 271; 2 Madd. Ch. 189, 325; Amb. 676; 2 Atk. 175. And by

J. M. Porter and Tilghman, for the appellees, who cited, Fisher v. Larrick, 3 Serg. & Rawle, 319; Lessee of Peters v. Condron, 2 Serg. & Rawle, 82; Brannan v. Kelley, 8 Serg. & Rawle, 479; Lessee of Culbertson v. Martin, 2 Yeates, 443; Stahle v. Spohn, 8 Serg. & Rawle, 317; Jackson v. Bush, 10 Johns. Rep. 223; Jackson v. Graham, 3 Caines, 188; Eisenhart v. Slaymaker, 14 Serg. & Rawle, 153.

The questions discussed on the argument, and the substance of the case as it appeared in evidence on the trial, will be found in the opinion of the court, which was delivered by

SMITH, J.—In this case the plaintiffs, on the trial, proved title in Jacob Gorr, by showing a precisely descriptive warrant to him, dated the 21st of October, 1818, the payment of the purchase-money, and a survey made in pursuance of the said warrant, on the 1st of October, 1823, which was accepted in the surveyor general's office on the 26th of February, 1824.

To show that this title had been transferred to them, they proved that there had been filed, in the prothonotary's office of Northampton county, a transcript of a judgment obtained before a justice of the peace, at the suit of John Arnold, John Miller, and William Kester, against the said Jacob Gorr, for one hundred and ninety-six dollars and two cents, and costs; a *feri facias* from the Court of Common Pleas of the said county to August Term, 1825; a levy, inquisition, and condemnation; a *venditioni exponas* to November Term, 1825; a sale by the sheriff, and a sheriff's deed duly acknowledged to John Arnold and John Miller, two of the plaintiffs in the judgment, for the premises in dispute. The levy, the *venditioni exponas*, and the conditions of sale, describe the premises by the same adjoiners mentioned in the sheriff's deed, but state the contents to be one hundred and ninety acres; but the deed states the contents to [*225] be one hundred and thirty acres. This has *evidently been a mere clerical error in drawing the deed. It is not important, as the contents are mere matter of description.

The plaintiffs then offered in evidence the conditions of sale, to which the defendants objected; the court, however, admitted them, and noted the objection; and this forms one of the reasons

[Arnold and another v. Gorr and another.]

assigned for a new trial. I do not see that the conditions of sale were very essential to the support of the plaintiff's claim, but they were part of the *res geste*, and certainly not irrelevant. I see no error in their admission.

The ejectment was only served on Jacob Gorr. But on motion to the Court of Common Pleas, "Garbutt Fisher claiming to be landlord of the defendant, (Jacob Gorr) was admitted, and made co-defendant." And on the trial he attempted to defeat the plaintiffs' claim by showing a loosely descriptive application, No. 1806, dated the 21st of August, 1766, in the name of John Keyser; a survey under it, on the 1st of October, 1823, five years after the date of Jacob Gorr's warrant; and a patent, dated the 20th of December, 1824, to Garbutt Fisher, which recited the above-mentioned application and survey, and certain intermediate conveyances from John Keyser down to Garbutt Fisher.

He also offered the following matters in evidence, which the Chief Justice rejected, and noted.

A deed poll from John Keyser to Joseph Galloway, dated the 15th of August, 1766, but made no proof of its execution; and a deed poll, indorsed thereon, from Joseph Galloway to Robert Levers, dated the 8th day of June, 1776. These deeds were not proved, or acknowledged; but to the latter there was a subscribing witness.

The record of a judgment in the Court of Common Pleas of Northampton county of September Term, 1788, No. 97, at the suit of William Fisher, assignee of Thomas Ashton v. Mary Levers, and George Levers, administratrix and administrator of Robert Levers, a sheriff's sale under it, and a sheriff's deed to Thomas Fisher, from whom they proposed to deduce title to Garbutt Fisher.

The record of an ejectment in the Circuit Court of the United States, brought to April Sessions, 1825, for the land in dispute by the lessee of Garbutt Fisher v. Jacob Gorr, in which the plaintiff obtained judgment on the 27th of May, 1825, and evicted the defendant under a *habere facias possessionem*.

And a lease, dated the 29th of September, 1825, at the time of the service of the *habere facias*, from Garbutt Fisher to Jacob Gorr, for the lands in dispute.

The rejection of the above stated evidence is urged in support of the motion for a new trial, as well as alleged misdirection in the court, who charged the jury, that the judgment given in evidence was sufficient to support the executions, and that the defendant in an execution, whose property has been sold by the sheriff, shall not defeat the purchaser in obtaining possession, by fastening himself to one who may have a good title.

[Arnold and another v. Gorr and another.]

[*226] *The two deeds poll were properly rejected. They had not accompanied the possession, and therefore do not come within the rule, familiar to all which permits ancient deeds, which have come along with, and accompanied the possession, to be given in evidence without proof of their execution. See Glib. Law of Evid. 94, 95.

The record of the judgment of William Fisher, Assignee, &c., v. The Administrators of Robert Levers, the sheriff's sale, sheriff's deed to Thomas Fisher, and mesne conveyances under this judgment to Garbutt Fisher, were properly rejected, as no interest in the lands was shown to have existed in Robert Levers.

The record of the action of ejectment in the Circuit Court of the United States, and the lease, were properly rejected, because the defendant in an execution, shall not be permitted to defeat the purchaser at sheriff's sale by such a proceeding. It would be opening the door to fraud and collusion. The purchaser has whatever estate the debtor had at the time of judgment rendered, and he must recover the possession where, as in this case, the defendant continues in possession, or the object of the law, the satisfaction of the debt, would be defeated. Here, too, the judgment in the ejectment was subsequent to the judgment under which the property was sold, and even to the issuing of the *feri facias*; and the lease was subsequent to the levy and condemnation.

But one other matter remains to be considered. Was the judgment sufficient to support the executions and sale? It is evident, that the judgment before the justice was rendered on the 11th of August, 1823, by the defendant voluntarily appearing and confessing judgment for an amount exceeding one hundred dollars. A transcript of this judgment was filed in the Court of Common Pleas on the 20th day of the same month. The plaintiffs subsequently took out an execution before the justice, which was returned, "No goods could be found to satisfy the demand;" a certificate to which effect they carried to the prothonotary's office, together with a precept for a *feri facias* on the 7th of April, 1824. The prothonotary, instead of filing this certificate, with the transcript already filed, filed and docketed it as a new transcript, and marked the executions as having issued upon it.

We sit here to do substantial justice, and not to catch parties in nets of form. We must make great allowances and large intendments in support of our judicial proceedings, which are generally not very formally kept; and I would therefore be for connecting all these proceedings together, making a whole of all the parts. If so, they appear perfectly regular.

[Arnold and another v. Gorr and another.]

But these proceedings cannot be overhauled collaterally. The defendant in the execution could have taken advantage of any error that actually existed, by motion to the Court of Common Pleas, before the sheriff's deed was acknowledged. The filing of the transcript made the judgment a judgment of the Court of Common Pleas for all purposes of proceeding against real estate. That court *is one of general jurisdiction; and, therefore, the rule as to inferior tribunals and limited juris- [*227] dictions does not apply to it or to its proceedings.

I can see no difference, or reason for a difference, between the case of the plaintiff in the execution becoming the purchaser, and that of a stranger. The act of assembly is general in its provisions in protecting purchasers, and I see no reason for restraining it to strangers only. The *dicta* of Judge Yeates, in Samm's *Lessee v. Alexander*, 3 Yeates, 268; and in Hiester's *Lessee v. Fortner*, 2 Binn. 40, founded on *Goodyer v. Junce*, in *Yelverton*, 179, much as I am disposed to respect his opinions generally, were not given on any points that arose in those causes, and without taking into consideration our act of assembly, which, I think, is decisive. On the whole, being satisfied with the verdict, and seeing no error, either in the decision as to the evidence, or in the charge of the court, I am for letting the verdict stand. The judgment of the Circuit Court is therefore affirmed.

.Judgment affirmed.

Cited by Counsel, 2 Penn. R. 89; 4 Wh. 38; 2 W. 237; 4 W. 273; 5 W. 273; 6 W. 294; 7 W. 23, 88; 8 W. 423; 2 W. & S. 316; 1 Barr, 150; 2 Barr, 76, 169, 250; 5 Barr, 520; 7 H. 83, 127; 9 H. 439; 12 H. 345; 1 C. 247; 6 C. 66; 2 G. 73; 3 G. 260; 14 S. 438; 2 W. N. C. 710.

Cited by the Court, 2 W. 148; 6 W. 401; 2 W. & S. 276.

Commented on, 6 H. 84.

An ancient deed accompanying the possession will be admitted in evidence without proof of execution, but the possession must have continued thirty years: *Walker v. Walker*, 17 S. 185; or, if the land is wild, payment of taxes for thirty years is sufficient: *Williams v. Hillegas*, 5 Barr, 492. The case of *M'Gennis v. Allison*, 10 S. & R. 197, would seem to be overruled.

[PHILADELPHIA, MARCH 27, 1829.]

Metzgar, for the use of Uhler and Another, *against*
Metzgar.

IN ERROR.

The assignee of the assignee of a bond, takes it subject to all the equities existing at the time of the assignment, between the obligor and the first assignee, notwithstanding such equities may have arisen before the bond came into the hands of the first assignee.

A judgment may be set off before a jury, against a demand not ascertained by judgment.

THIS was a writ of error to the Court of Common Pleas of *Northampton* county, which was returned accompanied by several bills of exceptions to the opinion of a majority of the court below, both in the admission of evidence, and in their instructions to the jury.

The action was brought in the name of Christian Metzgar, assignee of the executors of Andrew Metzgar, deceased, for the use of Valentine Uhler and Henry Uhler, against Philip Metzgar, upon a bond given by Philip Metzgar to Andrew Metzgar, dated the 26th of May, 1810, in the penalty of one hundred pounds, conditioned for the payment of fifty pounds on the 27th of May, 1825. This bond was, on the 8th of December, 1815, assigned by the executors of Andrew Metzgar, under seal and in the presence of two witnesses to Christian Metzgar, who, by [*228] an informal assignment *indorsed on the bond, transferred it on the 4th of January, 1816, to Valentine Uhler and Henry Uhler.

The defendant pleaded payment, with leave to give the special matters in evidence; to which he afterwards added the plea of set-off.

On the trial the defendant, under notice previously given, offered in evidence the record of a judgment for ninety-nine dollars forty-three cents, confessed before Frederick Heany, Esq., a justice of the peace, by Christian Metzgar, in favour of Philip Metzgar, on the 26th of August, 1809. To the admission of this evidence the counsel for the plaintiffs objected; upon which the President of the court requested the counsel for the defendant, to prove any circumstance which had a tendency to create a presumption of fraud in the assignment of the bond in question by Christian Metzgar to Valentine and Henry Uhler. This the counsel for the defendant declined doing. The Presi-

[Metzgar, for the use of Uhler and another, v. Metzgar.]

dent then delivered his opinion against the admission of the evidence; but the two associates overruled him, and permitted it to be given; upon which an exception was taken by the plaintiff's counsel to their opinion.

The defendant's counsel, in further pursuance of the notice given, offered in evidence a single bill given by Christian Metzgar to Philip Metzgar, for thirty-three dollars and forty cents, dated the 26th of August, 1809, and payable on the 29th of the same month, on which judgment was confessed before Daniel Brown, Esq., a justice of the peace. They also offered in evidence another single bill given by Christian to Philip Metzgar, for twenty-eight pounds, six shillings, and one penny, dated the 8th of May, 1813, and payable on the 27th of May, 1814. This evidence being objected to by the plaintiffs' counsel, the President gave his opinion in favour of maintaining the objection; but the associates again overruled him, and admitted the evidence; which formed the basis of three additional bills of exceptions, tendered by the counsel for the plaintiffs.

After the President had charged the jury upon the facts, he proceeded to give his opinion upon eight legal propositions submitted by the counsel for the plaintiffs, all of them involving the same principles upon which the questions of evidence had been decided; viz., whether or not the matters given in evidence, were a good defence against the plaintiffs' demand. Upon all these points the opinion of the President was in favour of the plaintiffs, but the associates differed from him on every point, and delivered their opinions to the jury, in accordance with which they found a verdict.

The counsel for the plaintiffs excepted also to the charge of the court.

Brooke and J. M. Porter, for the plaintiff in error.

1. The first question is, whether a judgment can be set off against a debt in suit? Judgments are not within the statutes of set-off. 1 Am. Dig. 344, Set-Off, pl. 2. Our defalcation act, (Purd. Dig. 177,) allows a set-off, in cases where two or more dealing *together, are indebted to each other, [*229] upon bonds, bills, bargains, promises, accounts, or the like; but the enumeration does not embrace judgments. In England, though not within the statutes, judgments may be set off against each other, on motion, under the equitable powers of the court; Montague, 6. This may be done with perfect justice to the parties; but where the plaintiff is obliged to bring suit for the purpose of ascertaining a disputed claim, it would be manifestly unjust to permit the defendant to set off a judgment against it, and thus throw the costs on the plaintiff.

[Metzgar, for the use of Uhler and another, v. Metzgar.]

2. The second question is, whether or not an obligor can set off against a second assignee, a debt due to him by the first assignee, before the execution of the bond? The doctrine of set-off has only been adjudged to affect the assignee of the obligee, on the ground that the obligor has become the creditor of the obligee, on the faith of the instrument. It has never been held that the obligor could set off a debt against the assignee of an assignee, unless, perhaps, during the time the first assignee held the bond, the obligor, on the faith of it, became his creditor. The leading cases in our own books, are of the defalcation of debts due by the obligee to the obligor. The decision in *Wheeler v. Hughes*, 1 Dall. 23, was, that the assignee takes the bond subject to all the equity the obligor has against the obligee. The principle the court has gone upon is, to be liberal as to the subject-matter of the set-off, but strict as to the persons between whom it is to take place; and an unwillingness has latterly been shown to extend the doctrine further than it has already gone. It has been truly said, that a set-off against an assignee does not rest on equity or good policy. Where the debt has been incurred by the first assignee, not only before the bond came into his hands, but even before its execution, no injustice can be done to the obligor by refusing to let him set it off after the assignment, because the inception of the debt had no reference to the bond; but to permit such a set-off, would be highly inequitable to the innocent assignee, who has paid a valuable consideration for the bond, and had no notice of any pre-existing debts between the first assignee and the obligor. *Davis v. Barr*, 9 Serg. & Rawle, 141; *Bury v. Hartman*, 4 Serg. & Rawle, 177; *The Bank of Niagara v. M'Cracken*, 18 Johns. 493; *M'Collough v. Houston*, 1 Dall. 441; *Reeder v. Lewis*, 9 Serg. & Rawle, 195; *Calhoun v. Snyder*, 6 Binn. 135. The act of 1715, sect. 3, (Purd. Dig. 97,) declares that the assignee of a bond shall recover what is due at the time of the assignment, "in like manner as the person or persons to whom the same was made payable might or could have done." Valentine and Henry Uhler were therefore entitled to recover whatever the executors of Andrew Metzgar could have claimed; and as the matters given in evidence could have had no operation in a suit brought by them upon the bond, it follows, that they cannot affect the instrument in the hands of the real plaintiffs in this suit.

[*230] *Scott*, for the defendant in error.—The position attempted to be maintained on the opposite side—that a judgment cannot be set off against a demand unascertained by judgment—is against sound reason, and even against common sense. It would be extraordinary, indeed, if a man were per-

[Metzgar, for the use of Uhler and another, v. Metzgar.]

mitted to set off an unascertained claim, and yet, as soon as it assumed a fixed and determinate character, be refused that privilege. It is essential to the goodness of a set-off, that it should be ascertained. Unliquidated damages in tort, which cannot be set off before judgment, may be set off after they are reduced to certainty by judgment. There is direct authority in support of the position contended for on behalf of the defendants in error. 1 Bac. Ab. 137, Set-off, C. Montague, 10.

2. The rule, that a purchaser for a valuable consideration shall be protected against secret trusts, is doubtless well established, but it is to be taken with this qualification, that he has not the means of notice of the existence of such trusts. If he has notice, or the means of knowledge, of which he neglects to avail himself, he is bound. When, therefore, a man is about to receive an assignment of a bond, it is his business to call on the obligor, and inquire what claims he has upon the obligee, or any of the previous assignees; and, if he neglects this easy precaution, he ought to be the sufferer, and not the obligor, who was a stranger to the transfer. Mutuality of credit has never been deemed an essential ingredient in the doctrine of set-off, but mutuality of remedy has. The settled rule is, that the assignee of a bond takes it subject to all the equity existing against the obligee; and payment to the assignor, without notice of the assignment, is good against the assignee. Notice puts an end to all privity between the assignor and obligor, and the assignee becomes the owner of the bond, subject to any existing equity against the obligee. After notice of the assignment, a new contract arises between the obligor and the assignee, who holds a chose in action no more negotiable than it was in the hands of the obligee. If he transfers it, he does so liable to all the equity arising from the contract between him and the obligor. If this be not the case, the effect of an assignment would be to make the instrument negotiable. The question is not, what equity there is between the obligor and obligee, but what equity there is in the obligor. The fact that Christian Metzgar was indebted to Philip Metzgar, while the former held the bond, amounted to payment of it, and chancery would have decreed it to be given up. *Ryal v. Rowles*, 1 Ves. 367; *Cromwell v. Arrott*, 1 Serg. & Rawle, 184; 1 Ves. Jr. 249; 2 Wash. 233, 254; 1 Madd. Ch. 126, 185, 186; Cro. Eliz. 14; 12 Mod. 422; 6 Bac. Ab. 453.

The opinion of the court was delivered by

GIBSON, C. J.—Our defalcation act, having been found extremely beneficial in practice, has been construed more largely than the words would seem to bear. Even the English statute, although more narrow in its words and construction, has not

[Metzgar, for the use of Uhler and another, v. Metzgar.]

been held to require that the debts to be set against each other, [*231] should have arisen out of the same transaction. The object is to promote convenience by preventing circuity of action; and that requires the defalcation of all demands which do not involve any great degree of intricacy in the inquiry. Why, then, should not the act embrace the debt of an intermediate assignee? The words certainly do not restrict the remedy to transactions between the original parties; and there are no equitable considerations to exempt the case of a subsequent assignee. At the time of the assignment, the right of defalcation existed in full force between the obligor and the intermediate assignee. By what right, then, can the latter put a subsequent assignee in a more advantageous situation than he held himself. In this state, no assignee, whether legal or equitable, can affect to be prejudiced by want of notice; it being his duty, as established by many decisions, to sound the obligor before he parts with his money, as to the amount actually due. With or without actual notice, therefore, he is precisely in the situation of the preceding obligor, whose title he bears.

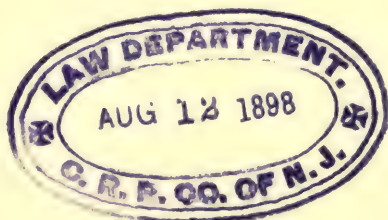
Nor is there more force in the objection, that a judgment cannot be set off before a jury. Judgments are frequently set against each other by the court; and there is no colour of argument against defalcating them from unascertained demands. A judgment may be the foundation of an action; and there is no reason why it should not be set up as a cross demand, equally with a bond or recognizance. It would be unjust to subject to the cost of a trial, a defendant who has a judgment sufficient to extinguish the plaintiff's demand altogether. The English decisions incontrovertibly establish the right of set-off in similar cases; and, although not the point decided, it was taken for granted by this court in *Waln v. Hewes*, (5 Serg. & Rawle, 468.) On both grounds, then, the set-off was properly allowed.

Judgment affirmed.

Cited by Counsel, Baldwin, 545; 3 Wh. 278; 5 Wh. 30; 3 W. 274; 5 W. 117; 7 W. 162; 8 W. 262; 9 W. 180; 1 W. & S. 419; 8 W. & S. 315; 6 H. 212; 3 G. 283; 30 S. 388; 11 W. N. C. 84.

Questioned by the Court, but followed in, 8 W. 446; 10 Barr. 431.

Commented on and overruled in, 10 Wright, 265.



[PHILADELPHIA, MARCH 27, 1829.]

Lancaster *against* Dolan.

EJECTMENT.

A mortgagee is a purchaser within the intent of the Stat. 27 Eliz. ch. 4.

In Pennsylvania a voluntary conveyance is not void against a subsequent purchaser by force of the Stat. 27 Eliz. ch. 4.

Under the act of assembly of the 18th of March, 1775, a voluntary deed, duly recorded, is as valid against a subsequent purchaser, as a deed for a valuable consideration, provided it be untainted by actual fraud.

A feme covert is, in respect to her separate estate, to be deemed a feme sole only to the extent of the power clearly given by the instrument by which the estate is settled, and has no right of disposition beyond it.

A power to appoint by any writing in the nature of a will or other instrument, under hand and seal, executed in the presence of two credible witnesses, is well executed by a mortgage, though it contain no reference to the power.

THIS was an ejectment, brought in this court, for a moiety of certain messuages and stores on the east side of Water Street, *between Market and Chestnut Streets, in the city of Philadelphia. It was tried at *Nisi Prius* in February, [*232] 1828, when, by consent, a verdict was entered for the plaintiff, for a moiety of the premises, subject to the opinion of the court, upon the whole evidence; the court to be at liberty to reduce the verdict to one-fourth of the premises, if they should think proper.

The plaintiff's title was as follows:—On the 16th of March, 1820, Edward Rogers gave his bond to Israel Lancaster, conditioned for the payment of three thousand dollars, in two years from its date, with interest. On the same day, the said Edward Rogers, and Tacy his wife, executed a mortgage upon the premises in controversy, for the purpose of securing the said bond. This mortgage recited, that Edward Rogers, and Tacy his wife, were indebted to Lancaster in the sum of three thousand dollars; was executed in the presence of two credible witnesses; was duly acknowledged, by both husband and wife, on the day it bore date, and was recorded on the 17th of April, 1820. On the 22d of January, 1821, the bond and mortgage were assigned, by Israel Lancaster, to John Ross, Esq., who, having obtained a judgment on the mortgage, on the 23d of March, 1826, issued a *levari facias* to July Term, 1826, under which the premises were sold, on the 22d of May, 1826, to Israel Lancaster, the plaintiff, to whom the sheriff executed a deed on the 28th December, 1826.

The defendants, who were the tenants of Rogers and wife, for whom defence was taken, relied on the following title; viz.

[*Lancaster v. Dolan.*]

On the 24th of October, 1811, Tacy Prior (who afterwards became the wife of Edward Rogers) executed a deed to William M'Pherson, in which she covenanted to pay, for the use of her mother, Mary Berrien, one-half of all the clear rents she might receive out of certain premises, of which the said Tacy was the owner of a moiety. The consideration of this deed was natural love and affection, and one dollar. It was not recorded. On the 6th of January, 1815, a deed was executed, of which the following is a copy :—

“ This indenture, made this sixth day of January, in the year of our Lord, one thousand eight hundred and fifteen, between Mary Berrien and Tacy Prior, daughter of the said Mary Berrien, both of the city and county of Burlington, in the state of New Jersey, single women, of the first part, and Burgess Allison, of the same place, doctor of divinity, and Elias Boudinot, of the same place, doctor of laws, of the second part. Whereas the said Tacy Prior was and is entitled to and stood seised of and in a considerable real estate, in the city and county of Philadelphia, and state of Pennsylvania, being lots of ground, rents, messuages, tenements, and hereditaments, as well as other real estate elsewhere, one-half of which she hath heretofore made over and conveyed to the said Mary Berrien for and during her natural life: And whereas the said parties, of the first [*233] part, are desirous of securing the said estate, *one-half for the sole use and benefit of the said Mary Berrien, for and during her natural life, and the residue to the said Tacy Prior, for the uses and purposes hereinafter mentioned; to these ends they have solicited the parties of the second part to accept of the trusts hereinafter mentioned, which they have reluctantly done.

“ Now, this indenture witnesseth, that the said Mary Berrien and Tacy Prior, for and in consideration of the premises, and also of the sum of one dollar, lawful money of Pennsylvania, to them in hand paid by the parties of the second part, the receipt whereof they do hereby acknowledge, and of every part and parcel thereof do hereby acquit, release, and discharge the said parties, of the second part; have given, granted, bargained, sold, conveyed, released, enfeoffed, and confirmed, and, by these presents, do give, grant, bargain, sell, convey, release, enfeoff, and confirm to the said parties, of the second part, their heirs and assigns, all and singular, the said real estate belonging to the said parties, of the first part, of which they stand seised or possessed, situate, lying, and being in the city and county of Philadelphia aforesaid, being lots of ground, rents, messuages, tenements, and hereditaments, as well as other real estate elsewhere, together with the hereditaments and appurtenances to

[Lancaster v. Dolan.]

the same belonging, or in any manner appertaining, and also all and singular their estate, right, title, interest, property, claim, and demand, both in law and equity, of, in, and to the same, belonging, or in anywise appertaining thereunto. To have and to hold, all and singular, the above granted and bargained premises, with every of the appurtenances, unto the said Burgess Allison and Elias Boudinot, and the survivor of them, his heirs and assigns, to the only proper benefit, use, and behoof of them the said Burgess Allison and Elias Boudinot, and the survivor of them, his heirs and assigns for ever; in special trust and confidence, nevertheless, that the parties of the second part, and the survivor of them, his heirs and assigns, shall and will hold the one moiety of the premises aforesaid, or equal half thereof to and for the use and behoof, and for the personal support and comfort of the said Mary Berrien, while sole, during her natural life; and also shall and will permit the said Mary Berrien, while sole, to use, improve, occupy, possess, and enjoy the same, or to receive the rents, issues, and profits thereof, subject, however, to all prior incumbrances already made thereon by the parties of the first part, or either of them; and in case the said Mary should marry again, then the moiety of the said premises to be held, by the parties of the second part, and the survivor of them, his heirs and assigns, for the only use and benefit of the said Mary, personally, and free from all interference, or claim, or control, of her husband, or any other person whatsoever; and the personal receipt or discharge of the said Mary, notwithstanding her coverture, shall be the only voucher or discharge for any payment that shall be made under this trust therefor. And, in further trust, as to the other moiety or remaining equal half part of the *above granted and bargained premises, during the natural life of the said [*234] Mary; and as to the whole of the said premises, after the death of the said Mary, the said parties of the second part, and the survivor of them, his heirs and assigns, shall and will hold the same, in like manner, as aforesaid, to and for the only use and behoof, and for the personal support and comfort of the said Tacy Prior; and also shall and will permit and suffer the said Tacy Prior, while sole, to use, improve, occupy, possess, and enjoy the same, and to receive all and singular, the rents, issues, and profits thereof, subject, however, to all incumbrances heretofore made thereon by the said Tacy; and in case the said Tacy should marry, then the same to be held to and for the only and personal benefit of the said Tacy, whether she be covert or sole, free from all interference, claim, or control of her husband, or other person whatsoever; and the personal receipt and discharge of the said Tacy, notwithstanding her coverture, shall be

[*Lancaster v. Dolan.*]

the only voucher or acquittance for any payment that shall be made under this trust, or for the use, occupation, or enjoyment of any part thereof, or for any of the rents, issues, and profits arising from the same. And on this further special trust and confidence, that after the death of the said Tacy, the premises aforesaid shall be held for the use of such person and persons, and to such uses and benefits, and for such term or estate as the said Tacy, in her lifetime, and whether she be married or single, and, notwithstanding her coverture, shall designate, order, or direct by any writing, either purporting to be her last will and testament, or other writing whatsoever, executed under her hand and seal, in the presence of, at least, two credible witnesses; and in case the said Tacy should die without leaving any such writing, purporting to be her last will and testament, or other writing, as aforesaid, then, and in such case, the said trustees, &c., shall hold the premises to and for the sole use and behoof of such issue as the said Tacy may leave, equally to be divided between them in fee simple. But if the said Tacy should die without leaving any issue, then the premises aforesaid shall be held in trust for the sole use and benefit of the brothers and sisters of the said Tacy, as shall be living at the time of her death, though but of her half blood, share and share alike, in fee simple, or to them, their heirs and assigns for ever. But if the said Tacy should die without leaving any issue, or brother, or sister, then the premises aforesaid shall be held in trust for and to the use of her heirs, on the part of the mother, in fee simple, share and share alike, as aforesaid. And, further, that if it should so happen, from any adventitious circumstances, that, in the opinion of the said trustees, or the survivor of them, his heirs and assigns, it should be more advantageous, and for the benefit and emolument of the parties of the first part, or either of them, their heirs and assigns, to have any part of the premises aforesaid sold or disposed of, that then the said trustees, and the survivor of them, his heirs and assigns, with the [*235] approbation and consent of the parties of the *first part, or the survivor of them, shall and may sell, bargain, grant, and convey, in fee simple, or otherwise, all or any part of the real estate aforesaid, for the most money that may be got for the same, and vest the net proceeds thereof in other productive real estate, to be held by the said trustees, or the survivor of them, his heirs and assigns, under and subject to the same trusts, uses, and purposes as above set forth: and it is further agreed, that in case the said trustees shall be put to any costs, charges, or expense, in the management of this trust, the same shall be paid out of the rents, issues, and profits of the premises. And the said parties of the second part, for them-

[Lancaster v. Dolan.]

selves, their heirs, executors, and administrators, do hereby covenant and grant, to and with the parties of the first part, their heirs, executors, and administrators, that they, the parties of the second part, will well and truly execute and perform the several trusts, above set forth, to the best of their abilities and knowledge. In witness whereof, &c."

This deed was recorded on the 21st of February, 1815.

James Henderson, Esq., who was examined as a witness for the defendants, deposed, that he had been the agent of Mrs. Berrien since Tacy Prior's deed, in 1811 : That he had received the rents of a moiety of the estate, and paid one-fourth part to her, or her order, and the other fourth to Tacy Prior, before her marriage with Edward Rogers, and since that time, either to herself, or to her husband, at her request : That he recollected having heard Mr. and Mrs. Rogers say something about their consent to the transfer by Lancaster to Ross : That he wrote the mortgage, but could not say whether or not he mentioned the deed of trust to Lancaster : That he believed it was adverted to after the execution of the mortgage, and that he did not see Lancaster at all before the mortgage was given.

Binney, for the plaintiff.—Whatever estate Tacy, the wife of Edward Rogers, had authority to dispose of, by the mortgage of the 16th of March 1820, Lancaster, the plaintiff, is entitled to recover in this ejectment. The question then is, what power had she by virtue of the deed of the 6th of January, 1815? The positions contended for are—

1. That she had power to dispose of one-half of her original moiety, (or one-fourth of the whole) for the term of her own life, and the reversion of the whole moiety after her death, and that of Mrs. Berrien.

2. That she did dispose of them effectually by the deed of mortgage of the 16th of March, 1820.

3. That she did also dispose of the one-fourth, voluntarily granted by her to Mrs. Berrien, and that the plaintiff is entitled to recover that.

It is not indispensable to the plaintiff's success, that the court should decide whether the reversion of Mrs. Rogers, after her death, and that of Mrs. Berrien, has been well appointed by the *deed of the 16th of March. It is only material to decide on the disposition of her life interest, which is the [*236] present possessory title ; but as it is important to the parties to know their rights, present and future, it will be proper to advert to the whole question.

1. By the deed of the 6th of January, 1815, Mrs. Rogers had an estate for her life, in one-fourth of the premises in dispute.

[*Lancaster v. Dolan.*]

It was an estate in her trustees, for her sole and separate use for life, and the deed contained no express restraint on her power to dispose of it. There is no mode of disposing of it pointed out so as to admit of the suggestion, that there is an implied prohibition of all other modes of disposition. On the subject of implied restraints much controversy has existed, some holding, that if a mode be pointed out, it is in the nature of a power, and all other modes are prohibited; while others hold that the wife has the general authority of an owner, and that no implied restraint arises from the designation of a mode in which she may convey. Being an estate for her separate use for life, she had power to dispose of it as if she had been a feme sole. *Bell v. Hyde*, Prec. in Ch. 328; *Norton v. Turvill*, 2 P. Wms. 144; *Gregly v. Cox*, 1 Ves. 517; *Davison v. Gardner*, Sugd. on Vend. 393; *Hulm v. Tenant*, 1 Br. C. C. 16, 19, 21; Sugd. on Pow. 113, 114; *Clancey on Married Women*, 351. Whether it be a trust in another to receive and pay her the rents, or a use, to occupy and receive herself, is wholly immaterial. Sugd. on Powers, 115, 116, 118, 119; *Brown v. Like*, 14 Ves. 302; *Hesse v. Stevenson*, 3 Bos. & Pull. 565; *Fettiplace v. Gorges*, 1 Ves. Jr. 46; 3 Ves. Jr. 437; 9 Ves. Jr. 524; *Jaques v. The Methodist Epis. Church*, 17 Johns. 548; 3 Johns. Ch. Rep. 108; *Newlin v. Newlin*, 1 Serg. & Rawle, 275; *Dullam v. Wampole*, 1 Peters, 116. The only case in which the wife cannot dispose of the whole, is where it is not her own separate property, but the fund is given by the husband to trustees, to stand in the place of maintenance during their separation, for which he continues liable. *Hyde v. Price*, 3 Ves. Jr. 437; Sugd. on Pow. 117. In this case, the estate belonged to the wife. She only could tie her hands, and she has not done so. As to her life estate, there is then no restraint to deprive her of the power to dispose of it as a feme sole; to charge and encumber it as she pleased.

As to the reversion, she had power to dispose of it, by any writing under her hand and seal, executed in the presence of two credible witnesses. There is no other restriction. The mortgage may be considered as a valid transfer, and as an appointment also. As a transfer, it had her separate examination, an assurance that it was not done by her husband's influence. It was the statutory mode prescribed for the conveyance of the wife's estate by the act of the 24th of February, 1770, sect. 2, *Purd. Dig.* 117, which declares that such a conveyance shall be as valid as if it were executed by a feme sole. It has, too, all the characteristics of a good appointment. It was executed under hand and seal, which was all the *deed of trust

[*237]

required. It is an established rule, that if the grantor

[*Lancaster v. Dolan.*]

has both a power and an interest, and he creates an estate which cannot be fed out of his interest, it shall be fed out of his power, though there be no reference to it. *Sudg. on Powers*, 212, 294, 296, 297, 298; *Campbell v. Leach*, Amb. 740. If he has a power, and no estate, a conveyance generally, with the requisite formalities, will take effect under his power, though made without reference to it. *Sir Edw. Clerr's Case*, *Sudg. on Pow.* 282. A mortgage is therefore a good disposition of the estate. *Peace v. Spierin*, 2 *Dess. Chan. Rep.* 460, is an analogous case.

As to the settlement on Mrs. Berrien, it was voluntary, and therefore fraudulent and void against a subsequent purchaser. This is a great question, but it is, at this day, settled beyond all doubt in England under the stat. 27 Eliz. ch. 4, sec. 2, by decisions which are binding authorities here. The legal presumption is, that a party who subsequently sells for a valuable consideration, did, by his former voluntary conveyance, intend to deceive. *Gooche's case*, 5 Co. 60; *Colville v. Packer*, Cro. Jac. 158; *Prodgers v. Langham*, 1 Sid. 133; *White v. Hussey*, Prec. in Ch. 14; *Tonkins v. Ennes*, 1 Eq. Ab. 334; *White v. Sansom*, 3 Atk. 412; *Lord Townsend v. Windham*, 2 Ves. 10; *Roe v. Milton*, 2 Wills. 356; *Goodright v. Moses*, 2 W. Black. 1019; *Chapman v. Emery*, Cowp. 280. This still continues to be the settled and decided law. *Doe v. Martin*, 1 Bos. & Pull. 332; *Mercer v. Welsmore*, 8 D. & E. 528; *Evelyn v. Templar*, 2 Br. C. C. 149; *Roberts on Frauds*, 13, 17, 33, 37, 66, 73; *Ridgway's Lessee v. Underwood*, Whart. Dig. 291, pl. 26, 1st Edit.

That a mortgagee is a purchaser is well settled. 1 Eq. Cas. Ab. 353; *Chapman v. Emory*, Cowp. 280; *Roscarriek v. Barton*, 2 Chan. Ca. 220; *Senhouse v. Earle*, Ambler, 289; *Roberts on Frauds*, 373, 392; *Verplank v. Sterry*, 12 Johns. 536.

J. R. Ingersoll, for the defendant made three points:—

1. The mortgage is ineffectual to bind any of the property contained in it.

2. If operative at all, it can only affect the life interest of Tacy Rogers in one-fourth of the premises, and can have no effect either upon the one-fourth which belongs to Mrs. Berrien, or on the remainder in the whole, which belongs to Mrs. Rogers' children.

3. And, at all events, it cannot bind more than one-fourth of the premises claimed, the other one-fourth being a life estate vested in Mrs. Berrien, who is in full life.

1. The broad question has never yet been determined in

[Lancaster v. Dolan.]

Pennsylvania, whether a feme covert, who has executed a conveyance of her separate estate to trustees, can make any further disposition of it herself, except under the provisions of the deed of trust; that is, whether the enumeration of her powers limits them to that enumeration, or the absence of particular restrictions leaves her, where unrestrained by special clauses, to dispose of the property as she *pleases. In the former [238] case, she can do nothing but what she is specially authorized to do; and, in this case, the mortgage not being enumerated among her powers, it is void on that account alone. In the latter case, she can do everything which she could do, if the deed of trust had never been made, unless there are restrictions by implication, for there are certainly none of an express and positive character. If she has this power, one of the great objects, perhaps the principal one of a marriage settlement, is frustrated. The objects generally in view in making marriage settlements, are, first, to prevent a husband's creditors from making a direct and forcible invasion on the separate property of the wife. This does not need any settlement if the property has never been reduced to his possession; and even where it has been, he in many instances becomes, and in equity is treated, as trustee for his wife. Even a court of law will sometimes extend its protection to the wife against the husband, holding that the persons named in a will as trustees for the person from whom she claimed, were also to be considered as trustees for her. 2 Roper, 152, 153.

The second object of such a settlement is to guard against the necessities, rapacity, and undue influence of the husband himself, which rarely can be done without a deed of settlement, and which is always in view when such a deed is made. This last and main object will be entirely frustrated on the principle which the plaintiff maintains. It is no answer to say, that as soon as the law is pronounced it will be known and followed, and marriage settlements hereafter framed in accordance with it. Many exist at this moment, and involve property to an incalculable amount, the dispositions of which cannot now be changed.

This point is undecided in Pennsylvania. In New York the final decision was in favour of the wife's power. The elaborate views of Chancellor Kent led him to a different result, but two judges, (Spencer and Platt,) and a majority of the senators differing from him, his opinion was reversed. 17 Johns. 594; 3 Johns. Ch. R. 19. In South Carolina the final decision was against the wife's power, Chancellor Dessausure having given a different opinion, which was reversed. Ewing v. Smith, 3 Dess. 417. As to the English cases, Chancellor Kent says,

[Lancaster v. Dolan.]

(3 Johns. Ch. R. 86,) "At the first glance of the authorities they appear to be full of contradiction and confusion." The law cannot, therefore, be considered as settled. On each side formidable names are to be found: Lord Macclesfield, Lord Talbot, and Lord Hardwicke, are one way, while Sir William Grant, Lord Bathurst, Sir Pepper Arden, Lord Roslyn, and Lord Alvanly are the other way. Lord Thurlow and Lord Eldon may be considered as doubtful. *Coverly v. Dudley*, 3 Ark. 541; *Cas. Temp. Talb.* 43 (note); 2 Ves. Jr. 488; 4 Ves. 129; 5 Ves. 692; 4 Bro. Ch. Ca. 483; 1 Bro. Ch. Ca. 16; 3 Ves. 437; 11 Ves. 209. Turning aside from the troubled current of authority, how should it be on principle? By *a deed [*239] of trust the property passes out of the woman who has been its proprietor. It is a gift to certain purposes, which she cannot of herself change, because the only mode of change contemplated is pointed out, viz., by the trustees with her consent. It is a limited, special power, which must be specially pursued. Various alterations have taken place in the law of marriage. It was formerly held, that separation and separate maintenance made the wife liable solely. But it is otherwise now. *Clancey*, 63, 64. It was likewise held, that the same circumstances rendered a wife liable to a commission of bankruptcy. *Ex parte Preston*, *Cooke's Bank. Law*, 30. The principle on which courts of equity formerly went, in relation to this subject, would not now be upheld. Lord Macclesfield says, "It is against common right that the wife should have a separate property from her husband, and therefore all reasonable intendments are to be made against her." *Powel v. Hankey*, 2 P. Wms. 82. A married woman certainly has not more power over her separate estate than another person. It is not an uncommon thing for a dissipated, an indifferent, or a weak man to convey his estate in trust, in order to place it out of his own control. When he has done so, it is gone. If the deed contain no reservations to himself, it is gone entirely; if there be reservations, they operate as exceptions to his entire relinquishment of the estate, and *pro tanto* enables him to act. But the exceptions prove the rule. What was the intention of this contract? If that can be discovered *ex visceribus*, it will be carried into effect. Great stress is not laid on the word "only," though it occurs more than once in the deed. No one can doubt that the settlement was made with a view to protect her property from her husband's debts, and from the consequences of her own fondness or fears, which might lead her to discharge them. The protection contemplated was not only from his debts, but from his interference, which was as much to be dreaded, if exercised through her agency, as independently of

[Lancaster v. Dolan.]

it. It was for her personal support and comfort that the fund was set apart, and therefore it could not be alienated. Knight v. Dowling, Carthew, 120; Herring v. Brown, Id. 23; Sugd. on Pow. 116, 299; 3 Johns. Ch. R. 88; Hyde v. Price, 3 Ves. 437; 9 Ves. 524.

The mortgage is not such an appointment as the deed of trust contemplated. The provision is, that she may designate the uses, persons, &c., for which and for whom the estate shall be held by any writing purporting to be a last will and testament, or other writing, &c., but it must be a designation to take effect after her death. The provision in the latter part of the will for a sale, does not support the mortgage, because the sale must be by the trustees, though the approbation of the *cestui que trust* is required. The appointment, too, must be connected with the trust. The trustees are to hold on special trust and confidence, for such uses as she may designate, but this mortgage takes from them all trust and confidence, by destroying the trust [*240] estate altogether. Again, the power *must be strictly complied with. Sugd. on Powers, 211, 213, 215. Upon the principle of intention, all the cases in Pennsylvania have been decided. Dallam v. Wampole, 1 Pet. 116, was a case of personal property, the principal of which, and not merely the interest, was settled to the sole and separate use of the wife. Any receipt from her would have been good for the whole. The case of Newlin v. Newlin, (1 Serg. & Rawle, 275,) went on the same principle. The Chief Justice declares, (p. 278,) "The object of the testator was to give his daughter the absolute power over the annuity," &c. "Her receipt was to be their (the trustees') discharge;" and when she received the money, she might have given it to her husband, or paid his debts with it. No such power is to be found in the deed now under consideration. The case of Peace v. Spierin, (2 Dess. 460,) does not prove, as is supposed, that the mortgage is an execution of the power of appointment. That case shows that the wife was indebted, at the time of the settlement and marriage, and the mortgage was given as a mere substitution for the mortgage for the purchase-money. In common parlance, a mortgage is not a deed or conveyance. Mrs. Rogers did not suppose, in executing it, that she was executing the appointment, and that is the test.

The position is assumed, that a voluntary deed is void against a subsequent purchaser, either with or without notice; a most harsh and unreasonable doctrine, if it be law, and applicable to this case. But it is neither the one nor the other. The principle asserted is, that the original owner, when he sells, proves that he had acted fraudulently in making the former voluntary

[Lancaster v. Dolan.]

deed, and that therefore it is void. This may be true as respects the grantor, but it would operate very unjustly as respects the grantee, who may have made many justifiable and laudable arrangements, founded upon the supposed ownership, all of which are to be frustrated at a distant day. If the principle of some of the old cases—that a voluntary deed is void—be established, it will carry the evil even beyond this point, and extend it to the vendees of a voluntary grantee. But this is not the law. The principles of the case of *Anderson v. Roberts*, (18 Johns. 515), are perfectly sound, viz. That a voluntary deed is not void, but voidable. That, to avoid it, the conduct of the grantee, as well as that of the grantor, must be fraudulent: That a *bona fide* purchaser, on either side will hold the property, and that the construction of the statutes 13 and 27 Eliz. is the same. There are many English cases, too, of an old date, which do not support the principle, that a voluntary deed is for that reason void. *Sagittary v. Hide*, 2 Vern. 44; *Jones v. Marsh*, Cas. Temp. Talb. 64; *Doe v. Routledge*, Cowp. 710; *Stephens v. Furman*, 1 Ves. 73; *Ithell v. Beane*, Ib. 215. The argument is, that the subsequent sale affects the grantor with fraud; but it is to be remarked, that, in the present instances, the grantor was a married woman, under the influence of the husband, and therefore error is not imputable to her. *Marchioness of Blandford v. Duchess of Marlborough*, 2 Atk. 545.

*But the plaintiff is not a purchaser. He is a mere creditor. A mortgagee is, perhaps, under certain circumstances, [*241] to be considered a *quasi* purchaser. He may bring ejectment, and thus treat himself as a purchaser; and such was the case in *Chapman v. Emery*. But if he acts, not as a purchaser but a creditor, if he treats the mortgage as a security for a debt, he must be considered a mere creditor, and all the principles applicable to him as a purchaser cease. This point is decided by the case of *Ridgway's Lessee v. Underwood*, Whart. Dig. 291, pl. 27. The principle now established is, that a voluntary settlement is not fraudulent, where the person making it is not indebted at the time, nor will subsequent debts shake it. *Russell v. Hammond*, 1 Atk. 15; *Read v. Livingston*, 3 Johns. Ch. Rep. 481; *Hildreth v. Sands*, 2 Johns. Ch. Rep. 48.

2. The two instruments of October 24th, 1811, and January 6th, 1815, divested Tacy Prior of one-half of her interest in the premises, during the life of her mother, and of the whole, after the termination of her own life, unless she disposed of it in the manner provided for by the deed of trust. In the absence of such a disposition, the estate was to go in the channel designated by the settlement, which in some respects changed the regular

[Lancaster v. Dolan.]

course of inheritance. All she could control, under any circumstances, was her life estate in one-fourth, and being now dead, no recovery can be had upon it.

3. The life estate of Mrs. Berrien is certainly untouched by anything Mrs. Rogers has done. The deed of 1811 is a covenant to stand seised. Such an instrument is good upon the consideration of blood, and cannot be revoked at the pleasure of the covenantor; 2 Roll. 785, l. 20. Although there may be difficulties in the way of the covenantee suing to enforce a voluntary agreement, yet her protection is entire. The deed of the 6th of January, 1815, however, leaves no ambiguity. It confirms that of 1811, specifically, and then proceeds to vest in other hands all the several interests. No objection is raised to it on the ground of fraud on the future husband. It was directed against no particular person whatever, and it was recorded soon after its date.

Reply.—It is objected, 1st, that a feme covert has no power over her separate estate, except what is expressly given to her, and for this *Ewing v. Smith*, 3 Dess. 417, is relied on. There is no warrant for this doctrine in any other case, and it is contrary to the law of Pennsylvania, as authoritatively settled in *Newlin v. Newlin*, 1 Serg. & Rawle, 275. The controversy has mainly been, between excluding all powers of disposition except such as are pointed out, and excluding none, except such as are negatived. *Newlin v. Newlin*, is an authority to show that no restraint exists, where none is expressed. The intention of the testator in that case was referred to, but it was inferred from the absence of any express restraint.

2. It is said that Tacy Prior was restrained as to the disposition *of her life interest, because, during her life, the [*242] premises were to be held for her personal support and comfort. For this Sugd. 116, is cited as an authority.

If this were law, it would be strange doctrine indeed, since the same object is implied in the settlement of every separate estate, and in none more than in that upon which *Newlin v. Newlin* was decided, which provided that the interest was to be paid annually for the daughter's separate use and benefit. But this is not Sugden's doctrine, nor that of *Hyde v. Price*, to which he refers. The words "personal support and comfort," are not in that case. The characteristics of that case are, that the wife was not to receive at all, but another was to receive for her maintenance, and that a trust was created by the husband to support the wife during separation. The characteristics of the present case are, that it was Tacy Prior's own estate, and that she was to receive herself, and her receipt to be a discharge.

[Lancaster v. Dolan.]

It is impossible to imagine larger rights than she has given to herself. She was to use, occupy and enjoy ; to receive the rents and profits, and her receipt was to be the discharge, not to the trustees, but to the tenants. The words "personal comfort and support," are used in relation to her use while sole, while, in case of marriage, the estate is for her "personal benefit," which shows there is no force or meaning in the words. Another argument urged in support of this objection is, that the estate was to be free of all interference of her husband. This evidently means in his own right, *jure mariti* ; not that she may not dispose of it to him. She could certainly give him the income, which the objection supposes she could not, as it rejects his interference either with or without her agency. All the decisions are against the doctrine contended for. Separate use, means that her husband cannot interfere with the estate against her will, and nothing more. No stress, it is admitted, can be laid on the word "only," and "sole" has no greater force. To the argument that no control is given to Tacy Prior over the capital during her life, it may be answered, that there was none in the case of *Newlin v. Newlin*, nor in any other case in which a question has arisen ; nor can these questions arise in any case in which such power is expressly given. It is said, too, that the power to sell given to the trustees, implies a restraint upon the right of the *cestui que trust*. But no authority has been cited to show that a restraint on the wife is to be inferred from an authority to trustees. The absence of general authority in the wife, is much more reasonably to be inferred, from reserving a particular authority to her ; and yet this is not the law. No one ever supposed that because he gives power to his executor to sell the real estate, his heirs, therefore, cannot. The power is granted to the trustees to do that which the *cestui que trust* cannot do. It is to them or the survivor to sell, with the consent of the *cestui que trusts*, or the survivor, and to settle the estates purchased with the proceeds, upon the same trusts. This is not inconsistent *with a right in the *cestui que* [*243] *trust* to transfer her interest in the trust.

3. It is further objected, that Tacy Prior could not by mortgage appoint the remainder, after her estate for life ; because, in the first place, the power reserved requires an absolute deed, and not a mortgage. This is not conceded to be the law. An appointment by way of mortgage, satisfies a power to appoint, generally. Sugd. 280 ; *Lascells v. Lord Cornwallis*, Prec. in Ch. 232 ; *Perkins v. Walsh*, 1 Vern. 97. Mrs. Rogers's was a general power of appointment. A general power is the right to appoint to whom the donee pleases ; a particular power is restricted to certain objects. "A general power is, in regard to

[Lancaster v. Dolan.]

estates which may be created by force of it, tantamount to a limitation in fee. He (the donee) has an absolute disposing power over the estate, and may bring it into the market whenever his necessities or wishes may lead him to do so." Sugd. 432. The mortgage is also objected to as a valid appointment, because it takes effect during her life, whereas the remainder was to be appointed after her death. But it is a mistake to suppose that the trust is for such persons as she shall appoint to take after her death; the trust, after her death is, for such persons as she shall appoint to take. There is no necessity that the instrument should appoint the party to take expressly after death. It has already been shown, that there is no necessity for any reference to the power of appointment. If a party be *cestui que trust* for life, with power to appoint the remainder after his death by deed, it cannot be questioned that he may convey the fee absolutely, or mortgage the fee. Whether the estate for life and in remainder unite and make one estate, it is unnecessary to inquire. In the present instance, the plaintiff has the trust as extensively as Mrs. Rogers had it, and how the legal estate stands, is not the subject of inquiry in this court.

As to the voluntary conveyance. The plaintiff is a purchaser, because he stands in the shoes of a purchaser of a mortgagee. A purchaser under execution upon a mortgage, has all the rights of the mortgagee. It is a sale of the mortgagor's right conveyed to the mortgagee,—a statutory foreclosure of the mortgage. Whart. Dig. 291, pl. 27. The distinction taken between bringing ejectment, and *seire facias* is without solidity. The form of the remedy does not vary the estate or the character of the party. The deed is not denied to be voluntary, in regard to Mrs. Berrien. The great weight of authority proves that such a deed is void against a subsequent mortgagee. The very case before the court, is the last case decided in England before the Revolution, and is an authority. *Chapman v. Emery*, Cowp. 280.

As to the merits, the case is clearly with the plaintiff. He is an honest lender upon a mortgage of the estate of the wife. Equity will protect him, and supply all defects in the appointment. Sugd. 366, 369.

[*244] *The opinion of the court was delivered by GIBSON, C. J.—Tacy Prior, being seised of a moiety of the premises, executed a conveyance to trustees, by which she limited a moiety of her moiety, to her mother, Mary Berrien, for life, and the residue, together with the remainder, after the death of Mrs. Berrien, to her own separate use for life: the remainder in fee to such person as she, by any writing in the

[Lancaster v. Dolan]

nature of a will or instrument under her hand and seal, and executed in the presence of two credible witnesses, should designate and appoint; in default of such appointment, to her issue, if more than one, equally, in fee; in default of issue, to her brothers and sisters in fee; and in default of brothers or sisters, to her right heirs on the part of the mother, in fee. She married Mr. Rogers, and with him executed a mortgage to the plaintiff of the entire moiety; on which it was sold and purchased by him at sheriff's sale. The questions which arise, are:—1. Whether the conveyance is void by the statute 27 Eliz. as regards the estate limited to Mrs. Berrien: 2. Whether Mrs. Rogers could dispose of the estate limited to her own separate use, without a power specially reserved: and, 3. Whether the mortgage was an effectual execution of the power as regards this remainder.

It must be admitted, that a mortgagee is a purchaser within the intent of the statute; *Chapman v. Emery*, (Cowp. 278,) is in point; and whatever may have been the character of the plaintiff originally, he has become a purchaser to every intent, by taking the thing pledged, in satisfaction of the debt. The question then comes to this: Shall we follow the English judges in holding every voluntary conveyance void as to subsequent purchasers, or interpret the statute anew, in reference to the circumstances and condition of our own country? Had the English construction been established before the American Revolution, although it is by common consent, agreed to be harsh and repugnant to natural justice, I would, in parity of circumstances, submit to it on the ground of authority. Whether it was so established, has been discussed by Chancellor Kent, in *Sterry v. Arden*, (1 Johns. Ch. Rep. 266,) and Mr. Justice Spencer, in *Verplank v. Sterry*, (12 Johns. Rep. 553), where the cases are collected and so minutely examined, as to leave no room for a review of them here. The conclusion of the Chancellor is, that "the late cases have declared no new doctrine, and have only followed the rule as they found it long before settled by a series of judicial decisions of too much authority to be there shaken." Mr. Justice Spencer, on the contrary, thinks that the authorities prior to the Revolution, "are in weight and number decisively adverse to the doctrine which now prevails in Westminster Hall." In this, the learned judge undoubtedly asks too much. But he might have conceded much without endangering the argument; for Lord Ellenborough, on whose opinion the Chancellor particularly relies, goes no farther than to say that "the weight, number, and uniformity *of [*245] the authorities" (in favour of the modern doctrine), "do very much preponderate." As to number and uniformity,

[Lancaster v. Dolan.]

those collected by him stand in the proportion of nine to eight ; which certainly shows no great preponderance ; and the four added by Chancellor Kent, are altogether insufficient to satisfy us that the question had been put at rest, even though some of the authorities on the other side may, as he alleges, have been but *dicta*. The whole mass evinces a restless and an unsettled state of the professional mind both on the bench and at the bar ; and although the weight of authority undoubtedly inclined in favour of the modern doctrine, it could with no propriety be considered as established at the declaration of our independence, the period material to the question of its recognition here. Nothing but an uninterrupted series of authorities established by common consent, ought to sustain a principle on which no titles depend, and which, in its origin, is admitted on all sides to have been erroneous and unjust. The statute is undoubtedly in force here. It does not, however, in terms declare voluntary conveyances to be void ; but only such as are made for the "intent and purpose to defraud and deceive such persons as shall afterwards purchase." The intent and purpose were consequently left to the judges, some of whom shortly afterwards began to consider every voluntary conveyance fraudulent without regard to the truth of the case. In *Cadogan v. Kennet*, (Cowp. 434,) Lord Mansfield expressed an opinion that the common law, as it is now universally known and understood, would have attained every end proposed by the statutes of Elizabeth. It would have done so undoubtedly ; but by a different process, it being a favourite maxim of the common law that fraud must be proved and not presumed. It is evident that the judges were led to carry the construction beyond the maxim, by motives of policy which, I submit, have no place here. Previous to the fourth year of Queen Anne, there was no provision for registering conveyances in any part of England ; and they are registered only in Yorkshire and Middlesex at this day. It is evident that where conveyances took effect according to priority of date without regard to notice, gifts afforded extraordinary facilities to fraud, in comparison with conveyances for a valuable consideration, the existence of which, in cases of controversy, could be shown as explicative of the transaction. It is, therefore, perhaps not strange that the judges cut the matter short by declaring all voluntary conveyances void, instead of embarrassing themselves with questions of notice ; especially as the equity of the donee who paid nothing for the estate, might, under any circumstances, seem unequal to that of a purchaser who had paid a fair price. With us the case is entirely different. The act of 1775, requires all conveyances to be recorded in six months ; and declares that "every such deed and conveyance which shall, at any time after

[Lancaster v. Dolan.]

the publication hereof, be made and executed, and which shall not be proved and recorded as aforesaid, shall be adjudged fraudulent and void *against any subsequent purchaser or mortgagee for valuable consideration, unless such deed [*246] shall be recorded as aforesaid, before the proving or recording of the conveyance under which such subsequent purchaser or mortgagee shall claim." This, it will be perceived, is predicated without distinction as to consideration: and it gives rise to an irresistible implication in favour of the converse of the proposition—that every conveyance, without exception, which is thus recorded, is effectual against subsequent purchasers and mortgagees. It seems to me the question might be safely rested here. To say the least, it is expressly established, that conveyances shall take effect, not according to priority of date, but of record notice. Title is made a matter of record and negligence is justly imputable to every one who purchases without having searched the proper office. Such a purchaser can pretend to no equity against one who has done what the law requires, to put him on his guard. It is admitted that a voluntary conveyance is good between the parties; and it is a common principle of equity, that an assignee with notice, must abide by the case of the assignor. But the pretended equity of a subsequent purchaser with notice, even as against a volunteer, would spring from an act, the consequence and design of which would be to enable the donor to cheat the donee. The purchase would be an act of collusion, and all the fraud would be on the side of the purchaser. The palpable injustice of this has drawn from the English judges an expression of regret, that voluntary conveyances had not been sustained against purchasers with actual notice. With them a distinction between actual and constructive notice might be proper: with us, where it is the fault of the purchaser himself, if he have not actual notice, there is not, and there ought not to be, a difference. Such a purchaser is justly chargeable with positive negligence, and would be chargeable with positive fraud, were the consequences to fall on any one but himself. An unregistered conveyance is to be postponed without regard to its consideration, no distinction being made by the terms of the act; and there is no reason for postponing a registered voluntary conveyance, when untainted with actual fraud, that would not equally attach to a conveyance for valuable consideration. The injury to the donee would be as great, although as he gave nothing for the estate, the hardship would be less. Still there would be a hardship, the difference even in this respect, being only in the degree.

As therefore the matter in *res integra* here, we are at liberty to interpret the statute according to the dictates of justice and

[Lancaster v. Dolan.]

convenience: at all events, its construction must bend to the provisions of our own statutes; and we are consequently of opinion, that the estate limited to Mrs. Berrien, is unaffected by the subsequent mortgage.

In consequence of the death of Mrs. Rogers, since the trial, the question which respects the estate limited to her separate use, although exceedingly important in its principles, involves no more [**247] *at present than the costs of the action. The conveyance is in trust "to permit her to use, improve, occupy, possess, and enjoy; and to receive all and singular the rents, issues, and profits." A use thus limited to any other than a married woman or feme in contemplation of marriage, would be executed; but it is immaterial whether the trust be to pay a married woman the profits, or to permit her to receive them, it being necessary to a separate provision that the legal estate should remain in the trustees, to prevent the husband from taking the profits and defeating the very object of the conveyance. (1 Saund. on Uses, 197.) The estate of Mrs. Rogers, therefore, is a trust, and without any power of disposition being annexed to it in the deed. It has been pressed in the argument that such a power is an inseparable incident of the ownership. Nothing in the law is more to be deprecated, than those decisions in which the right of a *cestui que trust* to dispose of his estate, has been recognised. Every attempt to secure a provision to a spendthrift child must prove abortive, while the trustees are bound to follow any disposition of it which he may make. It is still more unfortunate that, as regards their separate estates, femmes covert have been regarded in equity as femmes sole. It has been justly remarked, that if the principle be pushed to its extent, a married woman who has trustees, will be infinitely worse protected than if she were left to her legal rights. There are instances of wives having been coaxed or bullied out of the protection provided, even at the instant when the settlement was before the Court of Chancery. Ought we then to follow this principle farther than our own decisions have carried it? The English decisions, since the declaration of our independence, have unsettled everything. In some it has been held that the feme may exercise absolute dominion without an express power in the conveyance; in others, that she can exercise no power at all; and to this complexion they will perhaps come at last. But it is agreed on all hands, that her power is not to be extended beyond her personal estate and the profits of her land. She has not in a single instance been permitted to lay her hands on the inheritance. There is, indeed, no case in which the question involved the exercise of a power over her own life estate; but if her power does not comprehend the fee

[Lancaster v. Dolan.]

when she is the owner of it, it is not easy to understand how it can comprehend a less estate. It has been held to extend to copyhold, because the estate can be surrendered only by her act; and as she is exclusively the tenant, and the husband's authority is suspended, it seems there is no objection to her act in the court of the manor. But there is no instance of her having been permitted to dispose of freehold, except in pursuance of the terms of the trust, or by way of power over a use. *Peacock v. Monk*, (2 Ves. 190,) is express to the point. An agreement to dispose of the profits of her real estate, has been executed in equity; but in a later case, the Court of Chancery has refused to enforce a security on rents and profits under similar circumstances. Here, however, the mortgage *was [*248] not of the profits, and it would be asking too much to require us to treat it as an agreement contrary to the meaning of the parties.

But, it appears to me, the trust in favour of Mrs. Rogers, was intended to be unalienable. Although the distinctions on this head are justly obnoxious to the charge of subtilty, there is no doubt that the intention, where it is manifest, must prevail, although it be evinced by less than an express clause. Such an intention has been collected from very slight circumstances, such as a contingent interest in the wife after her husband's death; or a direction to pay the profits into the respective hands of the testator's sisters, as long as they shall live. Here the trust is expressed to be "for the personal support and comfort of the said Tacy;" a clause more clearly indicating an intent to prevent alienation by anticipation, than any to be found in the cases in which the exception prevailed; and the estate of Mrs. Rogers would therefore be unaffected by a rigid application even of the English cases.

In fine, notwithstanding the case of *Newlin v. Newlin*, (1 Serg. & Rawle, 275,) which was hastily determined on an exception to evidence, we are entirely prepared to adopt the conclusions of Chancellor Kent, in *The Methodist Epis. Church v. Jaques*, (3 Johns. Ch. Rep. 108,) that the English decisions are so floating and contradictory, as to leave us at liberty to adopt the true principle of these settlements; that instead of holding the wife to be a feme sole to all intents as regards her separate estate, she ought to be deemed so only to the extent of the power clearly given in the conveyance; and that instead of maintaining that she has an absolute right of disposition, unless she is expressly restrained, the converse of the proposition ought to be established—that she has no power but what is expressly given.

We are of opinion, then, that the plaintiff did not acquire the estate conveyed to the separate use of Mrs. Rogers.

[Lancaster v. Dolan.]

The remaining question depends on a few plain elementary principles. The use as to the remainder of the estate was executed by the statute; consequently the power of appointment reserved to Mrs. Rogers, being general, was intended to be exclusively for her benefit. In the words of Mr. Sugden, a general power of appointment is, in regard to the estates that may be created by force of it, tantamount to a limitation in fee, not merely because it enables the donee to limit a fee which a particular power may also do, but because it enables him to give the fee to whomsoever he pleases. He has an absolute disposing power over the estate, and may bring it into the market whenever his necessities or wishes lead him to do so. (Sugd. on Powers. 482, 485.) But a power to sell implies a power to mortgage, a mortgage being a conditional sale. (Mills v. Banks, 3 P. Wms. 9.) And it would seem, for the same reason, that a power to charge will not imply a power to mortgage. Under a general power, it has been expressly held that a mortgage is [*249] *a revocation, (Perkins v. Walker, 1 Vern. 97; Thorne v. Thonre, Ib. 141,) and there is no reason why the donee may not appoint, by way of mortgage, as he may treat the estate in every respect as his own. Here the mortgage must be intended to have been in execution of the power, although it contains no reference to it, because as the estate created by it, cannot be served out of Mrs. Rogers's interest, it must necessarily be served out of her power. It was therefore an effectual appointment.

SMITH, J., having been absent during the argument, in consequence of indisposition, took no part in the decision.

Judgment for the defendant, *non obstante veredicto*.

Cited by Counsel, 1 Penn. R. 345, 392; 3 Penn. R. 162; 1 M. 410; 5 R. 148; 3 Wh. 64; 4 Wh. 128; 5 Wh. 62, 122, 527; 10 W. 98; 2 W. & S. 432; 7 W. & S. 346; 2 Barr. 328; 4 Barr. 229; 5 Barr. 474; 7 Barr. 85; 9 Barr. 473; 2 J. 113; 3 H. 401; 6 H. 269; 8 H. 301; 1 Par. 438; 12 H. 255; 3 C. 79, 217; 7 C. 153; 8 C. 419; 10 C. 108; 11 C. 136, 374; 3 Wr. 504; 6 Wr. 334; 14 Wr. 131; 2 S. 157; 3 S. 308; 3 G. 283; 6 S. 394; 6 S. 481; 7 S. 510; 8 S. 402; 11 S. 77; 14 S. 210, 211, 222; 15 S. 295; 15 S. 471; 18 S. 103; 20 S. 504; 23 S. 190, 191; 27 S. 362; 29 S. 474; 5 N. 383, s. c. 6 W. N. C. 78; 11 N. 389, s. c. 8 W. N. C. 444; 1 O. 40; 2 W. N. C. 329; 4 W. N. C. 25; 4 W. N. C. 351; 10 W. N. C. 464; 12 W. N. C. 31; 14 W. N. C. 76.

Cited by the Court, 2 Ash. 451; 1 Par. 27; 3 Wh. 316; 1 W. 386; 5 W. 379; 4 W. & S. 100; 6 W. & S. 487; 1 Barr. 114; 4 Barr. 98; 7 Barr. 532; 9 Barr. 404; 2 C. 231; 14 Wr. 386; 22 S. 402; 25 S. 94; 28 S. 391; 30 S. 355; 5 N. 384; s. c. 6 W. N. C. 79.

This case was explained and approved in 3 R. 130.

Re-affirmed and followed in 1 Wh. 520; 2 Wh. 15; 4 Wh. 452; 9 W. 138; 8 Wr. 238; 10 Wr. 399; 7 S. 372; 23 S. 192.

The doctrine of Lancaster v. Dolan is, that a married woman has only those powers over her "separate estate in equity" that are expressly given her in the instrument creating the estate. It is the law to-day.

The Married Woman's Act (1848) created another kind of separate estate

[Lancaster v. Dolan.]

for married women, which has been called her "separate estate at law." *Pennsylvania Co. v. Foster*, 11 C. 134.

A *separate use* or "separate estate in equity" is the interest of a married woman in a trust for her sole and separate use. An estate under the Act of 1848, or a "separate estate at law," is the legal title that a married woman has in property which she owned before marriage, or which has since become vested in her by any form of conveyance, and which is not limited to her sole and separate use.

In respect to the latter estate, the wife may (1) make a will; (2) bind it by a contract for necessities; (3) bind it by a contract for repairs or improvement of her real estate. But she cannot dispose of it except by joining with her husband in a deed, and separately acknowledging the same, as provided by the Act of 1770: *Moore v. Cornell*, 18 S. 320; *Lippincott v. Leeds*, 27 S. 420. It was at first thought that she could also convey it separately, and there are *dicta* to the effect that she had all the power over this estate that she would have were she a *feme sole*: 1 J. 272; 1 H. 480; 4 H. 134; but these cases did not stand long; 6 H. 506; *Moore v. Cornell*, *supra*.

The separate use became entangled in the confusion that existed as to a married woman's power over her "separate estate at law," and the doctrine of *Lancaster v. Dolan*, was for a time overthrown. The case of *Haines v. Ellis*, 12 H. 253, arose upon a conveyance, in regular form, by husband and wife of an estate which had been granted directly to the wife for her sole and separate use. It was held that the conveyance passed a marketable title. The result of this decision was to create the impression that *Lancaster v. Dolan* was overruled (as appears from Mr. Justice Strong's opinion in the case of *Wright v. Brown*, 8 Wr. 224); but the ground on which it was rested was that as the conveyance was directly to the wife without the intervention of trustees, it could not be a separate use, and that the estate was therefore one which the Act of 1848 allowed the wife to convey. The error lay in holding that a conveyance to a trustee was necessary in creating a separate use. The contrary had been frequently decided: 4 W. & S. 95; 4 Barr, 223; 10 Barr, 423; and comes under the well-established rule that equity will not allow a trust to fail for want of a trustee. *Haines v. Ellis* was overruled in sections: in *Pennsylvania Co. v. Foster*, 11 C. 134, its effect was overruled, the court declaring that the Act of 1848 created a new separate estate, but that the doctrine of *Lancaster v. Dolan* still governed a separate use. The court, however, did not repudiate the real error of *Haines v. Ellis*, but distinguished that case as one in which the conveyance had been made directly to the wife without the intervention of trustees. On this common but mistaken ground these two cases might have stood together, but when the question next arose, in *Wright v. Brown*, *Haines v. Ellis* was first overruled on the point, what constitutes a "separate estate in equity," and then declared to be inconsistent with the later decision of *Pennsylvania Co. v. Foster*, and therefore overruled by it. The law was thus restored to its old position under *Lancaster v. Dolan*, and has since remained unshaken.

[PHILADELPHIA, MARCH 27, 1829.]

The Commonwealth, for the use of Black, *against* Conard and Another.

A prothonotary complies, substantially, with the directions of the act of assembly of the 24th of February, 1806, when, in entering judgment on a bond with warrant of attorney, upon the application of the party, he enters on his docket the names of the obligor and obligee, in the form of an action, as parties, the date of the bond and warrant of attorney, the penal sum, the real debt, the time of entering judgment, and the date of the judgment on the margin of the record.

An omission by the prothonotary to enter on the record a stay of execution provided for in the warrant of attorney, is not such a neglect of duty or mistake in the prothonotary, as will work a forfeiture of his official bond, and make him liable to the party for the amount due upon his judgment.

A prothonotary who wilfully neglects any duty, is liable upon his official bond to any one who may be thereby injured.

THIS cause was tried at *Nisi Prius*, at Philadelphia, in February, 1828, when a verdict was rendered for the plaintiff, subject to the opinion of the court upon the facts given in evidence, considered as a special verdict, whether or not the plaintiff was entitled to recover.

The case was this : John Conard was appointed prothonotary of the Supreme Court in the year 1817, and on the 31st of December, in that year, gave a bond to the commonwealth, in the sum of four thousand five hundred dollars, with Joseph Barnes and Samuel C. Michlin as his sureties, conditioned that he should "well and truly and faithfully, in all things execute the duties of the said office according to law," &c.

On the 5th of December, 1818, Ann Black (for whose use this suit was instituted), brought to the office of the defendant a bond and warrant of attorney to confess judgment, dated the 1st of December, 1818, and requested the prothonotary to enter judgment thereon.

The prothonotary, accordingly, entered judgment in the following manner, viz. :

[*250]

Ann Black,
"p. p. v.
139. Thomas Dobson.

5th Dec. 1818. Judgment.

*March Term, 1818.

{ Judgment entered 5th of December, 1818, on a bond and warrant of attorney, dated 1st December, 1818, for \$7568, conditioned for the payment of \$3784."

The bond was payable in one year from its date, and the warrant of attorney contained a proviso that execution should

[The Commonwealth, for the use of Black, v. Conard and another.]

not issue until the expiration of one year from the date of the bond.

On this judgment no proceeding took place until the 20th of November, 1823, when a *seire facias* issued to revive the judgment for another period of five years. In the meantime, several judgments were obtained against Thomas Dobson, and a mortgage was given by him. All his real estate was sold, and this court decided that none of the money arising from the sale was applicable to the payment of Ann Black's judgment.* This suit was instituted upon the official bond of the prothonotary, for an alleged breach of duty in omitting to enter on the docket the tenor of the bond, and the stay of execution provided for in the warrant of attorney; in consequence of which the lien of her judgment was lost.

Two questions were argued,—1. Whether the facts given in evidence proved a failure of duty in the prothonotary?

2. If they did, whether the plaintiff was entitled to recover upon his official bond?

Scott and Tod, for the plaintiff, referred to the act of the 24th of February, 1806, *Purd. Dig.* 409; 2 *Salk.* 417, 660; 5 *Co.* 53, b.; *Pennock v. Hart*, 8 *Serg. & Rawle*, 369; *Bombay v. Boyer*, 14 *Serg. & Rawle*, 253; *Black v. Dobson*, 11 *Serg. & Rawle*, 94; 1 *Bac. Ab.* 659; *Commonwealth v. Wolbert*, 6 *Binn.* 293; *Yard v. Lea's Executors*, 3 *Yeates*, 349; *Dallas v. Chaloner's Executors*, 3 *Dall.* 500.

T. Sergeant and Chauncey, for the defendants, cited 3 *Yeates*, 345; Act of the 12th of March, 1791, *Purd. Dig.* 749; Act of the 30th of March, 1811, *Purd. Dig.* 697; *Pitt v. Yalden*, 4 *Burr.* 2060; 8 *Mass. Rep.* 57.

The opinion of the court was delivered by

SMITH, J.—By the bond, the money was made payable in one year, and in the warrant of attorney to confess judgment, was a proviso, that execution should not issue for one year from the date of the bond. It was decided, in *Pennock v. Hart*, 8 *Serg. & Rawle*, 369, that where the stay of execution was entered on the docket, the judgment continued for five years from the expiration of the stay of execution. If the prothonotary had added to the entry of the judgment, *the words, “with [*251] stay of execution for one year,” the lien would not have been lost.

* See 11 *Serg. & Rawle*, 94.

[The Commonwealth, for the use of Black, v. Conard and another.]

The interest was punctually paid on this bond, up to the 1st of December, 1823.

The official bond of the prothonotary has been sued by Ann Black, and the question is,—was this such a neglect or mistake of the prothonotary, as to forfeit his bond, and make him liable to the plaintiff for the amount due upon her judgment?

To render the prothonotary liable, it must appear that he committed a breach of the conditions of his bond. And, to show that he has done so, it is alleged that he did not comply with the directions of the act of assembly, of the 24th of February, 1806, in two particulars. *First*, in not entering on his docket the tenor of the bond, or instrument presented to him by Ann Black. *Secondly*, in not entering the judgment, with the stay of execution therein mentioned. In order to decide, whether the officer did, or did not comply with the directions of the act, we must necessarily inquire what his duties were. The 28th section of the act of the 24th of February, 1806, (Purd. Dig. 409,) directs, that “it shall be the duty of the prothonotary of any court of record within this commonwealth, on the application of any person being the original holder (or the assignee of such holder,) of a note, bond, or other instrument in writing, in which judgment is confessed, or containing a warrant for an attorney at law, or other person, to confess judgment, to enter judgment against the person or persons, who executed the same for the amount, which from the face of the instrument, may appear to be due, without the agency of an attorney, or declaration filed, with such stay of execution as may be therein mentioned, for the fee of one dollar, to be paid by the defendant; particularly entering on his docket the date and tenor of the instrument of writing, on which the judgment may be founded, which shall have the same force and effect as if a declaration had been filed, and judgment confessed by an attorney, or judgment obtained in open court, and in term time.” And it further directs, that the defendant need not pay any costs or fee to the plaintiff’s attorney, when judgment is so entered on any such instrument of writing.

I do not think the object of the act was merely to take power from the attorneys, and to give it to the prothonotary; but that it was to enable the citizens to transact their own business in the offices, so far, at least as related to the entry of judgments on bonds, notes, or other instruments of writing, in which an authority to enter judgment was contained, without the intervention of attorneys; hence the act declares it to be the duty of the prothonotary, for the fee of one dollar, to enter the judgment, on the application of any person, who should be the holder (or the assignee of the holder) of a note, bond, or other

[The Commonwealth, for the use of Black, v. Conard and another.]

instrument of writing of the nature mentioned in the act; and that a judgment, so entered, should have the same force and effect, as a judgment on filing a declaration and confession *of judgment by an attorney. Clearly, then, since the [252] prothonotary is required to enter judgment, upon the mere application of the party, as he had been accustomed to do before the act of 24th of February, 1806, on the authority and instructions of the attorney, he is bound upon such application to follow the directions of the party in making the entry, as he was obliged to follow those of the former, in entering a judgment by warrant of attorney and confession thereupon; and he is not further bound. Neither his responsibility nor his compensation is increased by that act. He was entitled to the fee of one dollar for entering judgment pursuant to the *præcipe* of an attorney, and he is entitled to no more for entering it upon the application of the party. When the party gives no particular instructions, the prothonotary could only be liable for omitting to make a special entry, not required by the act of assembly, in case he acted with bad faith.

But it is contended, that the act requires the prothonotary particularly to enter on his docket, the date and tenor of the instrument of writing, on which the judgment may be founded, and that the word "tenor" has a legal signification, and means transcript or copy. If this were so, the consequence would be, that every bond, or other instrument of writing would have to be copied on his docket, *verbatim et literatim*, which could not have been intended by the legislature, otherwise they would have at once required and directed the officer to place an exact transcript or copy of the writing on his docket. This they have not done, and I therefore consider them, when they used the word "tenor," as referring to the substance or import of the instrument, which it was customary with attorneys, when they confessed judgments by virtue of warrants of attorney, to set out. It is also contended, that the act of the prothonotary is a mere ministerial act; that he has no discretion, but must obey the directions of the act of assembly. The directions of an act of assembly ought ever to be obeyed, not only by the officers of the commonwealth, but by all its citizens. I am, however, by no means prepared to say that the officer, in the present instance, disobeyed the law or directions of the act, so as to render him liable to the plaintiff. It is to be observed, that almost every prothonotary in this state has a different form of entering judgments, which, according to the late Judge Duncan, is "as various as their faces." In the case of *Helvete v. Rapp*, 7 Serg. & Rawle, 306, there is a form varying from the one before us. There the record was as follows, to wit:

[The Commonwealth, for the use of Black, v. Conard and another.]

"Frederick Rapp } v. "Francis Helvete }	Penalty, \$5,450.00 Real Debt, 2,725.38
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"Plaintiff files of record a judgment bond, under the hand and seal of defendant, for the sum of 5,450 dollars, conditioned for the payment of 2,725 dollars and 38 cents, on or before November 5th next, dated the 5th day of this instant, and entered the 17th of May, 1815."

[*253] *Here there was no actual judgment entered, at least, in terms there was none,—no copy or transcript of the bond, as now contended for,—merely the penalty, the real debt, the date of the bond, when payable, and the day of entering the same, are stated; and, although the bond was dated on the 5th of May, 1815, and entered on the 17th, and payable on or before the 5th of November, 1815, yet nothing is expressly entered, as to the stay of execution. This was decided by the Supreme Court, to be a valid entry and a good judgment; and the learned judge who delivered the opinion of the court said, that there being no literal form directed, and no precedent to guide the prothonotaries in the performance of this new duty, each had adopted his own mode, and that many of the entries scarcely presented a feature to inform purchasers, or designate a judgment. In the case under consideration, we think that the prothonotary substantially complied with the directions of the act, when he entered on his docket the names of the obligor and obligee, in the form of an action as parties,—the date of the bond and warrant of attorney,—the penal sum, the real debt, and the time of entering the judgment; and, moreover, the date of the entry of the judgment on the margin of the record, where the same judgment was entered, according to the act of the 21st of March, 1772. Should we now, for the first time, give a different interpretation to the act, it would lead to consequences extremely unjust. It is not pretended, that in this case there was any wicked or perverse intention on the part of the prothonotary,—he is free from any such charge: so, too, from the charge of ignorance, and of particular negligence. If, then, he erred at all, it must have been an error of judgment in the interpretation of an act of assembly, which cannot legally render him liable. As well might it be said, that inferior courts were responsible for the errors of their judgments.

But it is further said, that he is liable to the plaintiff, because he did not enter the stay of execution on his docket. It is to be observed, that the stay of execution is no part of the bond, but a part of the warrant of attorney; and it is not pretended, that the omission to state the stay of execution, rendered the

[The Commonwealth, for the use of Black, v. Conard and another.]

entry of the judgment invalid, or the judgment itself void. The prothonotary, acquainted with what had been usually done in other similar cases, placed, in this case, upon his docket, what had been usually placed there before, and no more. It is not alleged that he acted wrong intentionally ;—neither he, nor the plaintiff, (indeed very few lawyers,) foresaw or expected the decision in *Pennock v. Hart*, made in 1822. Before that decision was published, a *scire facias* to revive this judgment actually issued, previous to the expiration of the five years from the entry of the bond. Was it incumbent on this officer to know, or rather foreknow, the construction given to the act in *Pennock v. Hart*? The plaintiff had by the entry of the prothonotary a lien—a valid and binding judgment, and a right to issue execution on it at the end of a year : she did not, however, *issue an execution, nor revive the judgment, but by [*254] inattention lost her lien. Whose fault was this? Was it the prothonotary's? The plaintiff evidently thought, as the prothonotary did, that her lien would continue for a period of five years from the day of its entry on record ; for on the 20th of November, 1823, she issued a *scire facias* to revive her judgment—only fifteen days anterior to the expiration of the five years. At this time, I presume, the decision in *Pennock v. Hart*, had become known, and it was supposed, might operate on this judgment ; the difficulty then started for the first time ; and it occurred to the plaintiff that the prothonotary must be liable, although he had entered for her a valid judgment, attaching a lien on the defendant's real estate, and thereby entitling her to a complete right to all the benefits of such a judgment, which she could, at the proper time, have enforced, although the stay of execution was not stated on the record. Besides, the plaintiff could have continued her lien, if she had taken out an execution, or had issued her *scire facias* within the proper period ; the lien was lost by her neglecting to take the necessary steps to preserve it, or by mistaking the law. In such a case, I never can charge, as a default of the officer, that which is the negligence or default, or ignorance of the party.

In the course of the argument, it was contended by the able and respectable counsel for the defendants, that if there had been any failure of duty in the officer, it was not such as could be embraced by his official bond ; and that the plaintiff was not entitled to any benefit from it. In reference to which it may suffice to say, that if the evidence in this case had shown a clear failure of duty in the prothonotary, such a failure would have amounted to a breach of the condition of his bond, of which the plaintiff could have availed herself. A prothonotary wilfully neglecting any duty, which he is bound to perform, is liable

[The Commonwealth, for the use of Black, v. Conard and another.]

within the terms of the condition of the bond, which was intended for, and inures to, the benefit of every citizen who may be injured. Upon the whole, we think the judgment should be rendered for the defendants.

Judgment for the defendants.

Cited by Counsel, 1 Penn. R. 275; 1 Wh. 272; 2 W. 472; 9 W. 99.

Cited by Court, 20 S. 234.

[*255]

*[PHILADELPHIA, MARCH 27, 1829.]

Moser *against* Libenguth and Another, Administrators of Libenguth.

APPEAL.

A bond in which the obligors declare themselves to be jointly held and firmly bound to the obligee, in the sum of, &c., to which payment they bind themselves, their heirs, executors, and administrators, and every of them, is a joint, and not a joint and several bond.

APPEAL from the decision of Smith, J., at the Circuit Court of *Montgomery* county, held the 10th of April, 1829.

Peter Moser brought this action of debt against Eve Libenguth and John Libenguth, administrators of Jacob Libenguth, deceased, upon a bond in these words, viz.

“Know all men by these presents—That *I, Joseph Libenguth, of the borough of Pottstown, and Jacob Libenguth of Pottsgrove township, all of Montgomery county and state of Pennsylvania, are jointly held and firmly bound unto the said Peter Moser, of the borough of Pottstown in the county of Montgomery and state of Pennsylvania, in the sum of four hundred pounds in gold or silver lawful money current in Pennsylvania, to be paid to the said Peter Moser, or to his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made and done, we bind ourselves, our heirs, executors, administrators, and every of them, firmly by these presents. Sealed with our seals, dated the second day of April, in the year of our Lord one thousand eight hundred and twenty-one.*

“The condition of this obligation is such—That if the above bounden *Joseph Libenguth, or Jacob Libenguth, or either of them, or their heirs, executors, administrators, or any of them, shall and do well and truly pay or cause to be paid, unto the above named Peter Moser, or to his certain attorney, executors, administrators, or assigns, the just and full sum of two hundred pounds, with lawful interest, in like money as aforesaid, at or upon the first day of April, in the year of our Lord one thousand eight*

[Moser v. Libenguth and another, Administrators of Libenguth.]

hundred and twenty-two, without fraud or further delay, then the above obligation to be void and of no effect, otherwise to be and remain in full force and virtue.

“JOSEPH LIBENGUTH. (Seal.)

“JACOB LIBENGUTH. (Seal.)

“Sealed and delivered in presence of

“WILLIAM MINTZER

“JACOB MISSIMER.”

The parts of the bond in italics were written, and the residue printed.

*The cause was tried on the pleas of payment with leave to give the special matters in evidence; *non est* [*256] *factum*, and the following plea:—

“That the writing obligatory, if any such was sealed and delivered by the said Jacob Libenguth, was sealed and delivered jointly with one Joseph Libenguth, who is still living, to wit, at Montgomery county, and not by the said Jacob Libenguth alone.”

The plaintiff replied *non solvit* and issues, and, “That the plaintiff ought to have his action, &c., anything in the aforesaid plea notwithstanding; and that the said writing obligatory in the declaration mentioned was sealed and delivered by the said Jacob Libenguth jointly and severally with the said Joseph Libenguth.”

William Mintzer, one of the subscribing witnesses, proved the execution of the bond; and that Jacob Libenguth was the surety of Joseph Libenguth in the said bond.

Henry Moser proved, that the consideration of the said bond, was the purchase-money of a certain house and lots of ground in Pottsgrove, purchased by the said Joseph Libenguth from the said Peter Moser.

The jury, under the direction of his Honour, found a verdict for the plaintiff, for six hundred and fifty-nine dollars and thirty-six cents.

The defendants’ counsel, on the same day, moved for a new trial, for which the following reason was filed, viz.

The judge charged the jury, that the bond upon which suit is brought, is a joint and several bond, and not a joint bond.

The motion for a new trial was overruled, and the defendants appealed from the decision.

Rawle, jun., for the appellants.—The only question is whether the bond is joint, or joint and several. As there are no equi-

[*Moser v. Libenguth and another, Administrators of Libenguth.*]

table circumstances in the case, effect must be given to it purely as a legal instrument; and, far as the courts have latterly gone in construing bonds to be joint and several rather than joint, they have never yet pronounced an instrument like this, unattended by any equity, to be several, even where the parties have not declared themselves bound, as they have done in this case, jointly. The extent to which they have gone, has been to consider a bond as several where it might fairly be inferred from circumstances, that such was the intention of the parties, or where the deceased obligor has received the money, or been a partner, or derived some benefit from the loan, or some other circumstances existed, which would make it against equity to exonerate his estate. This has been done on the principle of reforming the instrument. In *Besore v. Potter*, 12 Serg. & Rawle, 154, the instrument was precisely like this, except that there the obligors did not declare themselves to be jointly held. Prior to that case, the words, "we bind ourselves, our heirs, executors, and administrators, and every of them," had never been held to make a bond several. An examination of that case will [*257] show that it does not entrench so much as it might be imagined, upon what was considered the law. It was decided upon the equitable circumstances of the case; Judge Duncan, who delivered the opinion of the court, considering it to be a case in which equity would reform the instrument, and declaring his opinion to be in accordance with that of Chief Justice Marshall, in *Hunt v. Rousmanier*, 8 Wheat. 174; and though he laid hold of the words, and every of them, as showing intention, he admitted that some latitude must be taken to give them that effect. It cannot, therefore, be doubted, that if he had been sitting as a law judge merely, he would have construed the bond to be joint, as it certainly would be held in England. If this view of the subject be correct, the bond in question is a joint bond independently of the word "jointly," prefixed to the declaration of indebtedness. The defendants' intestate had received no benefit whatever; there was nothing in the case to create an equity against him, and he was therefore entitled to that favour, which was always extended to sureties by courts of equity. He is bound to the extent of his bond, but no further. It is no argument to say that the obligors intended to bind themselves severally, and did not know the difference between a joint and a joint and several bond. It is enough to say, that they are supposed to know the law. But there are substantial reasons why a man should consent to bind himself jointly with another, and thus limit his responsibility to his own life, and yet refuse to enter into an obligation the terms of which would sub-

[*Moser v. Libenguth and another, Administrators of Libenguth.*]

ject his representatives to lawsuits. *Weaver v. Shryoch*, 6 Serg. & Rawle, 262.

If, then, the intention of the parties was not positively declared by the use of the word "jointly," the implication from the words "every of them," would not be strong enough to make this a joint bond, viewing it merely as a legal instrument independently of equity. But, whatever may be the force of implication, it is never permitted to push aside the express declaration of the parties; and, as they have said in this instance that they are jointly bound, the court are not to imply, from doubtful words, that they intended to be bound severally. A bond clearly several in its terms, has been held joint by the introduction of the word conjunction. 5 Bac. Ab. 163, 164. By considering the bond as joint, effect is given to all its parts, while, to treat it as several, the word jointly must be stricken out. The term jointly refers to the responsibility which the obligors assume; while the words, "every of them," may fairly be construed to mean all the executors of the surviving obligor. If the word "jointly" had been introduced inadvertently, there might be some weight in the suggestion that the parties attached no force to it, and were not aware of its effects; but it is to be observed that it is found in the written part of the bond, while the words which are relied upon as words of severalty are in the usual printed form. If, therefore, actual intent is to govern, the case is with the defendants, so far as intent can be gathered from language.

**Kittera*, for the appellee.—To pronounce the instrument on which this suit is brought joint, it will be necessary to overturn no less than four decisions, upon words of precisely the same import. *Geddis v. Hawk*, 10 Serg. & Rawle, 33; *Besore v. Potter*, 12 Serg. & Rawle, 154; *Moneugh v. Butler's Administrators*, cited in 12 Serg. & Rawle, 158; *Detterer v. Custer*, MS. Case. The only difference between these cases and that under consideration is, that here the binding is joint in express words; but this is nothing more than the law imports from the words, "we bind ourselves," which make a joint obligation as completely as any form of words that could be devised, and yet they have been held to be controlled by the subsequent introduction of the words, "and every of them," by which a joint bond is converted into a joint and several one. The intention of the parties to make this a joint obligation, it is impossible to doubt. It is almost always the intention; for no unlettered man ever dreams of the distinction between such instruments. It was prepared by a man who was not a lawyer,

[*Moser v. Libenguth and another, Administrators of Libenguth.*]

and who filled up a printed form, inadvertently omitting to introduce the words "and severally," after the word "jointly."

Judgment reversed, and a new trial awarded.

Cited by Counsel, 2 Wh. 78; 4 W. 51; 1 W. & S. 367; 12 H. 493; 4 W. N. C. 164.

Cited by the Court, 1 Penn. R. 290.

Affirmed, 2 R. 430; and followed, 2 W. 416.

[PHILADELPHIA, MARCH 27, 1829.]

Stoddart, for the use of his Assignees, against Allen and Another, Assignees of Moore, Myers & Co.

If an assignment be made for the benefit of such creditors as shall execute a release within a given time, one to whom a debt is actually due, and who releases within the time, but afterwards takes up notes drawn and indorsed by him for the accommodation of the assignor, is not entitled to a dividend of his estate upon the notes thus taken up.

CASE for the opinion of the court, as follows:—

"John Stoddart, and Moore, Myers & Co., were merchants, and had considerable dealings together, in the course of which, they lent and indorsed notes for each other, to a large amount.

"On the 21st February, 1820, John Stoddart made a general assignment to Thomas Fletcher, for the benefit of his creditors; and on the 25th of the same month, he executed another assignment of the same nature to the same person and Jacob Butz, (prout assignment,) without stipulating for a release.

"On the 7th of March, 1820, Moore, Myers & Co. executed an assignment of the same nature, to William Allen and Richard Rowley, in which assignment is a provision in favour of certain preferred creditors, and also in favour of general creditors who shall within a certain limited time, execute a release to the said Moore, Myers & Co., (prout assignment.)

[*259] *"Moore, Myers & Co. were indebted to John Stoddart, at the time of executing their assignment, exclusive of the accommodation notes and indorsements existing between them, in the sum of twelve thousand and sixty-one dollars and thirty-four cents.

"The assignees of John Stoddart executed a release to Moore, Myers & Co., within the time prescribed by their assignment.

"A number of notes, some drawn by John Stoddart, and indorsed by Moore, Myers & Co., and some drawn by Moore, Myers & Co., and indorsed by John Stoddart, a part of them for the use of Moore, Myers & Co., and a part of them for the

[Stoddart, for the use of his Assignees, v. Allen and another, Assignees of Moore, Myers & Co.]

use of John Stoddart, were outstanding in the hands of third persons, at the time when Moore, Myers & Co. executed their assignment.

"The notes specified in the schedule A. hereto annexed, were in the hands of the holders therein mentioned; were originally given for the use of Moore, Myers & Co.; the said holders did not execute the release to Moore, Myers & Co., but resorted to the estate of John Stoddart, and these notes were, after the time for executing the release to Moore, Myers & Co. had expired, under a general arrangement between the assignees of John Stoddart, and the creditors of John Stoddart, paid by the said assignees with the estate of the said John Stoddart, assigned to them as aforesaid, distributed among the creditors, (prout arrangement,) and are the notes on which the assignees of Stoddart claim a dividend from the assignees of Moore, Myers & Co., to recover which, this suit is brought.

"The notes specified in the schedule B. are holden by the banks and persons therein mentioned; were originally given for the use of Moore, Myers & Co.; the holders executed the release to Moore, Myers & Co.; have claimed on the estate of John Stoddart; have received from his assignees a dividend of ten per cent. and are entitled to the benefits of such further dividend as may be made.

"The notes specified in schedule C. are holden by the Farmers' and Mechanics' Bank; were originally given for the use of John Stoddart; the holders executed the release of Moore, Myers & Co., and have received from their assignees a dividend of twelve and a half per cent. They have also received from the assignees of John Stoddart a dividend of ten per cent.

"The notes specified in schedule D. are holden by the banks therein mentioned; were originally issued for the use of John Stoddart; the holders have not executed the release of Moore, Myers & Co., and have not received and are not entitled to receive any dividend from their estate. They have received a dividend of ten per cent. from the assignees of John Stoddart.

"The defendants, under the assignment, have declared a dividend of twelve and a half per cent.

"On these facts the following questions arise for the decision of the court:

*1. "Whether the assignees of John Stoddart are entitled to a dividend from the estate of Moore, Myers & Co., on the notes mentioned in schedule A? [*260]

2. "If entitled, whether such dividend is to be on the amount of the notes or any other amount? If the court shall be of

[Stoddart, for the use of his Assignees, v. Allen and another, Assignees of Moore, Myers & Co.]

opinion in favour of the plaintiffs, judgment to be entered for the plaintiffs; the amount to be ascertained by the court, or by reference under its direction."

SCHEDULE A.

"The State Bank at Camden, (N. J.,) held the following notes:—

One, dated the 5th of February, 1820, drawn by Moore, Myers & Co., in favour of, and indorsed by John Stoddart, at sixty days, for	\$500.00
One, dated the 15th of January, 1820, drawn by John Stoddart, in favour of, and indorsed by Moore, Myers & Co., at sixty days, for	350.00
One, dated the 24th of December, 1819, drawn and indorsed as the last, at ninety days, for . . .	2,651.37
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	\$3,501.37

"The Bank of Pennsylvania held the following:—

One, dated the 22d of February, 1820, drawn by Moore, Myers & Co., indorsed by John Stoddart, at sixty days,	\$1,350.00
One, dated the 16th of February, 1820, same drawers and indorser, at sixty days,	900.00
One, dated the 2d of February, 1820, drawn by John Stoddart, indorsed by Moore, Myers & Co., at sixty days,	600.00
	2,850.00
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	\$6,351.37

"The Commercial Bank of Pennsylvania held the following:

One note, dated the 14th of January, 1820, drawn by John Stoddart, indorsed by Moore, Myers & Co., at sixty days,	2,000.00
"J. and W. Lippincott held the following:—	
One note, dated the 15th of September, 1819, drawn by Moore, Myers & Co., indorsed by John Stoddart, at six months,	2,943.06
One note, dated the 5th of November, 1819, same drawer and indorsers, at five months,	466.90
	3,409.96
	<hr/>
	\$11,761.33

"All for the use of Moore, Myers & Co."

[Stoddart. for the use of his Assignees, v. Allen and another, Assignees of Moore, Myers & Co.]

*SCHEDULE B.

[*261]

"The State Bank at Camden, a note for	\$500.00
The United States Bank, three notes, amounting to	2,000.00
The Bank of the Northern Liberties, two notes, amounting to	850.00
Lambert, a note,	896.50
Henry Becket, a note prosecuted to judgment,	3,199.03
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	\$7,445.53

SCHEDULE C.

"The Farmers' and Mechanics' Bank, two notes, amounting to	\$3,287.50
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SCHEDULE D.

"The Camden Bank, a note amounting to . . .	\$1,545.50
The United States Bank, notes amounting to .	3,186.70
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	\$4,731.20

The assignment of Moore, Myers & Co., after the usual words of transfer, and after sundry preferences, contained the following clause:

"After payment of the herein before mentioned debts, the amount of moneys remaining in the hands of the said William Allen and Richard Rowley, shall be paid unto and among such of the creditors of the said firm, (or of the individuals composing the firm of Moore, Myers & Co.,) residents of the United States, who shall execute a release bearing even date herewith (deposited with the said assignees), within sixty days from the date thereof, and also unto and among such foreign creditors, or those residing out of the United States, as shall execute the said release within six calendar months from the date hereof, in fair and ratable proportions and dividends, of and upon their respective debts and claims, so far as the said residue of the estate of Moore, Myers & Co., and their estates individually, will go to discharge and satisfy the same."

It was contended by *Chauncey* and *Binney*, for the plaintiff, that the assignees of Stoddart having satisfied out of his estate, the holders of the notes in schedule A., although after the time stipulated for the execution of the release, and although the

[Stoddart, for the use of his Assignees, v. Allen and another, Assignees of Moore, Myers & Co.]

holders of the notes had not executed it, were entitled, by a fair construction of the assignment, to a dividend on them.

The great object of the assignment was to provide for the payment of all the debts of the assignors. The notes were included as debts, not the holders of the notes as creditors. It was no matter in whose hands the notes lay. The names of [*262] the payees were only *introduced to describe the class of debts, not to fix on the persons who were to receive the dividends.

[Tod, J.—What is the rule in cases of bankruptcy?]

Under the English statutes of bankruptcy, that is, if Moore, Myers & Co., had committed an act of bankruptcy, the plaintiffs would be entitled to a dividend. Prior to 7 Geo. 1, a note of hand could not be proved before it became due. 49 Geo. 3, let in the surety. 6 Geo. 4, adopts the same principle, and goes further, letting in contingent debts generally. The term creditor, in this assignment, means any person who has paid or is liable to pay; though the dividend cannot be claimed till after payment is made.

They cited, *Heilner v. Imbree*, 6 Serg. & Rawle, 401; *Lee v. Rapp*, Mosely, 318.

D. P. Brown and *Rawle*, for the defendants, observed, that the holders of these notes having by their omission to execute a release within the limited time, clearly forfeited their right to the benefit of the assignment, could not, by the arrangement made with the assignees of Stoddart, convey to them any right to a dividend. The case would have been different if the arrangement between those assignees and the holders, had been made within the sixty days. The release executed by them would have covered the notes, of which, by that arrangement, they had become the proprietors; but as the case stands, they have not the shadow of a right. They cited *Howis v. Wiggins*, 4 Durnf. & East, 714; *Cowley v. Dunlop*, 7 Durnf. & East, 565; *Buckler v. Buttivant*, 3 East, 72; *Ex parte Walker*, 4 Vesey, 373; *Ex parte Earle*, 5 Ves. 833.

The opinion of the court was delivered by

SMITH, J.—It appears, from the case submitted to this court for their opinion, that John Stoddart, and the firm of Moore, Myers & Co., had considerable dealings together, and that they were desirous of mutual accommodation, which was afforded by lending to, and indorsing notes for each other, and which proved, as is often the case, ruinous to both parties. Hence, it became necessary for them to execute assignments for the

[Stoddart, for the use of his Assignees, v. Allen and another, Assignees of Moore, Myers & Co.]

benefit of their creditors. The former, on the 21st day of February, 1820, made a general assignment to Thomas Fletcher, and on the 25th day of the same month, executed another of the same nature to the same person, and to Jacob Butz. On the 7th day of March, 1820, the latter executed an assignment to William Allen and Richard Rowley, for a similar purpose, containing, however, a provision, in favour of certain creditors, whom they preferred, and a further provision in favour of general creditors, who should within sixty days execute a release to them. At the time of executing this assignment, Moore, Myers & Co., were indebted to John Stoddart, *in the sum of twelve thousand and sixty-one dollars [*263] and thirty-eight cents, exclusively of certain accommodation notes, and indorsements, existing between them. A release, as stipulated by Moore, Myers & Co., in their assignment, was executed to them by the assignees of John Stoddart, within the time prescribed. When Moore, Myers & Co., executed their assignment, there were outstanding, in the hands of third persons, a number of notes, some of them drawn by John Stoddart, and indorsed by Moore, Myers & Co.; and some drawn by Moore, Myers & Co., and indorsed by John Stoddart, a part of them for the use of the former, and a part for the use of the latter. The notes mentioned in the case stated, marked A., were in the hands of the holders there mentioned, and were for the use of Moore, Myers & Co. These holders did not execute a release to them, but thought proper to resort to the estate of John Stoddart; and after the time for executing the release had expired, those notes were distributed among the creditors under an arrangement between John Stoddart's assignees and his creditors, and paid by the said assignees with John Stoddart's estate. They are the notes, on which the assignees of John Stoddart claim a dividend, and for which this suit is brought against the assignees of Moore, Myers & Co. The question then is, can the assignees of John Stoddart recover a dividend from the estate of Moore, Myers & Co., on the above mentioned notes? A debtor, may, by an assignment to others, dispose of his estate in trust, for the use and benefit of his creditors; in such an assignment, some creditors may be, and often are preferred, whilst others are postponed; and, however hard this may appear to be, yet the law is so; *lex ita scripta*, and we must take it as we find it. Assignors too, like the present, generally consider drawers and indorsers of accommodation paper, entitled to a preference; it is considered as due, under an honorary obligation, and is almost always given. The terms under which the preference is to be received, are prescribed by the assignor, as the law-

[Stoddart, for the use of his Assignees, v. Allen and another, Assignees of Moore, Myers & Co.]

giver, in his deed of assignment and a compliance with them, on the part of him, who is to have the benefit of the preference, is required. These principles are not controverted. Moore, Myers & Co., in their assignment of the 7th day of March, 1820, preferred certain creditors, and took care besides, to prefer general creditors, who should, within a certain limited time, (sixty days,) execute a release to them; directing that whoever complied with this stipulation, should be entitled to the benefit of the fund allotted to such general creditors; but that such of them as did not execute the release required by the assignment, should not be entitled to any part thereof, and in short, should not be "Creditors" of Moore, Myers & Co., as to that particular fund. The holders of the above-mentioned notes, were general creditors of Moore, Myers & Co.; they did not, however, execute [*264] the release to them as stipulated in their assignment, but, resorted to the assignees of John Stoddart, or his estate, for payment of the notes. Nor was this all: after the time for executing the release to Moore, Myers & Co. had expired, these same notes, under a general arrangement, between the assignees of John Stoddart, and the creditors of John Stoddart, were paid by his assignees with the estate assigned to them, and distributed among the creditors of John Stoddart. If, then, the assignees should be permitted to recover in this suit, it would be for the use of the creditors of John Stoddart, and, as I think, give rise to a double dividend. Be this, however, as it may, it is evident to my mind, that under the express terms of the assignment, the notes were not a debt, for which the plaintiffs could claim a dividend by virtue of the assignment, nor could the holders of them, although creditors of Moore, Myers & Co., because they had not executed the release required; and, not complying with the terms of the assignment, had not entitled themselves to the benefit arising from this particular fund. In 6 Serg. & Rawle, 401, it was held, that the preference is not to the creditor, but the debt. Here it is reasonable to infer, that no debt was intended to be preferred, but such as the assignor should be discharged from. It would be unreasonable to give any one the benefit of the assignment, who could not secure him from liability to the notes in the hands of the holder. The consideration of the assignment, was personal exemption from the debt, and the assignor would not have the benefit of this consideration if the notes could be brought against him by any one. The plaintiff alleges, that the holder could not release the assignor, without releasing him (the plaintiff,) at the same time. This is a strange objection coming from him, who could have obviated that consequence, by an arrangement with

[Stoddart, for the use of his Assignees, v. Allen and another, Assignees of Moore, Myers & Co.]

the holder. Even if he could not, it does not follow that he should be let in on the fund. The debtor had a right to make his own terms; and if the plaintiff was not in a situation to comply with those terms, it is his misfortune; but it gives him no ground to complain. It is no doubt the interest of the debtor now, that the plaintiff should come in on the fund. But it was not so at the time of the release, the period when the rights of the parties vested. It certainly was not, because the debtor was then exposed to the notes in the hands of the holders; and the plaintiff having since taken them up, can acquire no right, which he had not then. The assignees of John Stoddart stand in no better situation than the holders, from whom they have derived their title, and who cannot, by making over to others such notes, thereby impart to them a benefit to which they themselves were not entitled. These notes, on the 7th day of May, 1820, when the sixty days had expired, being the property of certain holders, if the assignees, to whom they were delivered by the several holders, were permitted *to receive a dividend, their [*265] situation would be better than that of the holders, if they had not parted with the notes. Such advantages the law does not recognize. The holders having resorted to another fund for payment, cannot, after this, transfer the notes to one, who, as a general creditor, had complied with the terms of the assignment, by executing a release for his own debts, so as to enable him under this release, in which the debt created by these notes was not embraced, to come in, and claim a part of a fund for them which the holders would have had no right to claim or demand. The right to receive a dividend cannot be made better by negotiating the notes after the sixty days mentioned in the assignment had expired.

In this assignment, we have the words "creditors," and it is contended, that indorsers for their indorsement, or drawers for Stoddart, are creditors within the true meaning of the assignment; and this, whether they were compelled to pay the notes or not. It would be so, if Stoddart had held the notes at the time of the assignment, or had then received them for a valuable consideration; he would, in that case, have stood in the situation of a creditor, and would have been entitled to receive a dividend of the notes; but at the time of the assignment, or at the time of the signing of the release, Moore, Myers & Co. were not indebted to the estate of John Stoddart, or his assigns; on these notes—no debt existed then, for his assignees obtained the notes after the sixty days; and upon what principle they could come in as creditors under the assignment, and claim a dividend, I am really at a loss to conceive. No debt was existing at this

[Stoddart, for the use of his Assignees, *v.* Allen and another, Assignees of Moore, Myers & Co.]

time, by or from either party,—no cause of action then existed by Stoddart's assignees against Moore, Myers & Co.: their cause of action arose after the assignment, and arose by their taking up indorsed paper of a debtor, after they had executed a release of all actions and all causes of action existing on the 7th day of March, 1820; not of causes of action, which should exist thereafter, as on the 7th day of May, 1820. An indorser or transferee, who did not entitle himself to the notes, by actually paying for them before the assignment, cannot be a creditor within its terms. I believe no instance can be produced, where an indorser of a note was ever entitled to sustain a suit, when no payment was made by him. In the case of a bankrupt, an indorser being in the nature of a surety, cannot prove a debt under the commission, unless he has actually paid the money before the bankruptcy. 1 Hen. Blacks. Rep. 641.

I apprehend the remedy which the plaintiffs have upon these notes, is against Moore, Myers & Co., or John Stoddart, personally; but to the fund in the hands of the assignees of Moore, Myers & Co., they have not entitled themselves. My answer to the proposed question, therefore, is, that the assignees of John [*266] *Stoddart are not entitled to a dividend from the estate of Moore, Myers & Co., on the notes, which were taken up by them, after the time of the assignment and release. Judgment is therefore to be entered for the defendants.

Judgment for the defendants.

Cited by Counsel, 3 Wh. 536; 6 Wh. 262; 8 Wright, 227.

[PHILADELPHIA, MARCH 27, 1829.]

Case of Bonsall's Appeal.

Where, under the circumstances, it was manifestly for the benefit of the ward, at the time, to convert his personal into real estate, and even to expend money in the improvement of the real estate, a guardian was held to be justifiable in so doing, although subsequent and unexpected events rendered the measure injurious to the ward.

APPEAL from the decree of the Orphans' Court of the city and county of *Philadelphia*, on the exceptions filed to the report of the auditor on the account of John Bonsall, guardian of Hannah Hughes.

The auditor having reported a balance of one thousand five hundred and thirty-seven dollars and thirty and a half cents against the guardian, he filed the following exceptions to the report:

[Case of Bonsall's Appeal.]

Exception 1st.—That the auditor has charged the said guardian with the sum of five hundred and ninety dollars and ninety cents, (less one hundred and ninety-six dollars and ninety-seven cents, set apart as the proportion of dower, payable to the widow of Thomas Hughes,) as the amount of moneys payable to the ward the 10th of May, 1819, by James Hutchinson and Edward B. Hughes, as her proportion of the purchase-money of a farm, in Exeter, Berks county, in which she was interested; in lieu of which amount, he accepted an interest in the land of one-third of one thousand seven hundred and seventy-two dollars and seventy-two cents. Whereas, if the guardian be at all chargeable with the purchase-money of the said farm, the liability cannot exceed three hundred and ninety-three dollars and ninety-three cents, (less one hundred and ninety-six dollars and ninety-seven cents,) the interest of the ward being one-third of one-third, and not one-third of one-half, as was supposed and reported by the auditor, making a difference of one hundred and ninety-six dollars and ninety-seven cents.

Exception 2d.—That the auditor has erred in charging the said guardian with the interest of the said ward in the purchase-money of the said farm, the same having been purchased by the said guardian and the children of Thomas Hughes, who were of age; (to wit, the said James Hutchinson and wife and Edward B. Hughes,) *to prevent a sacrifice and loss, and the same [*267] having always been held in good faith, as the property of the said ward and the other children of the said Thomas Hughes, making an erroneous charge of three hundred and ninety-three dollars and ninety-three cents.

Exception 3d.—That the auditor has erred in omitting to credit the said guardian with several sums of money, by him disbursed in erecting a stone dwelling-house on the estate in Exeter, purchased as aforesaid, and belonging in part to the said ward, and amounting together to two hundred and seventeen dollars and ninety-six cents.

The facts upon which these exceptions were founded are fully stated in the following—

Decree of the Court.—“The exceptions of the guardian to the report of the auditor, in this case, who has reported a balance as due the ward, of one thousand five hundred and thirty-seven dollars and thirty and a half cents, will be better understood by referring to the leading facts connected with the objected items of debit. The accountant was guardian of Samuel, Thomas, and Hannah Hughes, minor children of Thomas Hughes, deceased. Thomas Hughes died intestate, leaving five children, to wit: Edward B. Hughes and Jane Hutchinson, wife of James Hutchinson, and the three wards of

[Case of *Bonsall's Appeal*.]

the accountant. Among other estate, the decedent was the owner of a farm in Berks county. This farm was, upon the application of Samuel Lightfoot and John Evans, his administrators, ordered to be sold by the Orphans' Court of Berks county, and was purchased by Edward B. Hughes and John Hutchinson, for three thousand five hundred and forty-five dollars and forty cents, being at the rate of forty-eight dollars per acre. On the first of April, 1810, a deed was executed by the administrators, to Hughes and Hutchinson. On the 26th of May, 1819, Hughes and Hutchinson and wife conveyed one moiety of this farm to John Bonsall, for the consideration of one thousand seven hundred and seventy-two dollars and seventy-two cents. The deed to Bonsall is absolute on the face of it; no trust of any kind appearing in it. The evidence in the cause, however, shows that the farm had been twice exposed to sale by the administrators; once when ninety-nine dollars per acre were bid for it, which they refused to accept; and a second time, when it was purchased by Hughes and Hutchinson. At the time of the purchase, an understanding, they say, existed between them and the administrators, that John Bonsall, the guardian of the other children, should have the opportunity of uniting in the purchase, which was considered advantageous. A proposal to that effect was made to Mr. Bonsall, who acceded to it, and the deed for the moiety already alluded to, was executed to him. No money was actually paid by the guardian upon this purchase; his part of the purchase-money being satisfied by receipts to the administrators on account of his wards, the administrators [*268] having originally received from Hughes and Hutchinson a mortgage for the purchase-money. No sufficient dwelling-house being upon the premises, Hughes, Hutchinson, and the guardian united in erecting one at a joint expense of one thousand two hundred and ninety-three dollars. The guardian's half of this expense was paid out of the moneys of his wards. This purchase proved a most unfortunate speculation. Edward B. Hughes, after residing on the farm for four years, paying no other rent than the taxes and one outstanding dower of sixty-six dollars per annum, to which the property was subject, left it, finding, as he said, "he could make nothing there." He has been succeeded by a tenant who occupies the farm at the same rate, but whether with the same prospect, does not appear. The depreciation in the value of the property is attributed to the sickness and mortality that, after the purchase, devastated the neighbourhood. The auditor, in settling and adjusting the accounts of John Bonsall as guardian of Hannah Hughes, has rejected his claim for a credit of her portion of this purchase and the expenses of the improvements and charged him with

[Case of Bonsall's Appeal.]

one-third of one-half the purchase-money of the farm. The exceptions of the guardian complain, first, that he is not chargeable with the moneys invested in the farm and improvements; secondly, that if he is so, he can only be charged with one-third of one-third of the purchase-money; that being, as he alleges, all Hannah Hughes' interest in it, and not one-third of one-half the proportion charged by the auditor.

"The first branch of these exceptions brings up the question as to the right of a guardian to invest the personal estate of his ward, in the purchase and improvement of real property. The argument for the guardian went upon the broad ground that this was a question of *bona fides*, and that if the court should be satisfied that the purchase was made under an honest conviction that it was for the advantage of the ward, and with the exercise of that degree of prudence which a judicious man would employ in the conduct of his own affairs, the ward must accept the land. This would, indeed, be the introduction of a novel and a most dangerous principle in the laws governing the important relation of guardian and ward—a principle at variance with the policy of our positive institutions, and calculated to extend a discretionary authority to guardians, which sooner or later would produce the most disastrous effects. But, whether we consider the question with reference to our peculiar system, or the general principles of law, independent of statutory enactments, the conclusion must be against the guardian. Our lawgivers have exhibited a peculiar anxiety in guarding the property of minors against the fraud or negligence of those whose duty it is 'to take care of their persons and estates.' By the act of assembly, which constituted this court, passed as early as 1713, guardians are authorized 'to put out their minors' money to interest, *upon such security as the [*269] court might allow of.' If the security is taken *bona fide*, and without fraud, and should prove insufficient, the loss is the minor's. But, even with this guarded authority, it is required 'that the day of payment of the money put out at interest, should not exceed twelve months from the date of the security given.' This power has been extended by the act of 1824, which empowers guardians, with the approbation of this court, to invest the funds of their wards, in the stock or debt of the United States, the State of Pennsylvania, or city of Philadelphia, or in real securities. In the sale or mortgage of the real estate of a minor, for his maintenance and education, equal caution is exercised. For either purpose, the consent of this court must be first obtained; and when effected, before the guardian can execute either deed or mortgage, he must give security to the satisfaction of the court, for the faithful appro-

[Case of Bonsall's Appeal.]

priation of the funds so obtained. The recognition of the principle contended for by the guardian in this case, would be a judicial repeal of all this system, so far as it respects investments of minors' money. The wholesome checks imposed on guardians would be destroyed, and their place badly supplied, by subjecting the conduct of the guardian to the test of good faith or otherwise. In those inquiries, in which we have no positive rules to guide us, this is indeed the proper test; but, where such rules prevail, they must furnish the rules of decision. But, upon general principles of law, such a conversion of a trust fund is inadmissible. That a guardian out of court, cannot change the nature of the estate of his ward, by turning money into land, or *vice versa*, is a well settled rule in equity. *Rook v. Warth*, 1 Vesey, 461; *Witter v. Witter*, 3 P. Wms. 100; *The Earl of Winchelsea v. Norcliffe*, Vernon, 435; *Pierson v. Shore*, 1 Atk. 480. I say out of court, because a court of chancery, from the plastic nature of its powers, can so mould any authority it may impart for this purpose, as to obviate all the inconveniences which might otherwise result from it. Thus, a guardian may be authorized by the Chancellor, to lay out the money of an infant, in trust for his executors and administrators, if he should die during his infancy, and after his maturity, for him and his heirs. In this way, one of the most prominent of the evils incident to such a change of the fund is obviated. The infant after fourteen, or certainly after seventeen years of age, may bequeath it by will, or, in case of his intestacy, it still goes to his personal representatives. We possess no such power, and if we did, it has not been invoked. From the remarks already made, it will be perceived, that the doctrine would enable a guardian, by converting the personal into real estate, to deprive the infant of his right to dispose of his personal estate by will, and to alter the course of distribution in case of intestacy. No such doctrine, however, exists; and, if a guardian of his own motion, will so employ the funds of his ward, he must run the hazard of his act being subsequently recognized or rejected at the pleasure of the ward.

[*270] *⁴“The other exception is erroneous in point of fact. The interest of the three minors was one-half of the land, if they had elected to take it. The deposition of Edward B. Hughes, the witness for the guardian, shows, that he never paid a cent of his own funds for the land, but that the administrators accepted his receipts on account of his wards, as satisfaction for his moiety. Besides, he has, in the most unequivocal manner, acknowledged, that he considered that the minor's interest in the land. On the 26th of July, 1826, after the report of the auditor against him, and after his exceptions were filed, he

[Case of Bonsall's Appeal.]

executed a deed to his three wards, for the one moiety of the farm, for the purpose, it would seem, of showing his readiness to do all he thought himself called upon. After such an admission as this, connected with the evidence in the cause, it is vain to argue that the interest of each of the minors is less than one-third of one-half in the land, or rather, in the purchase-money. There are some exceptions filed by the ward to the report, but these have not been sustained. The report of the auditor, Mr. Kane, stands in all particulars confirmed, and the court finally decree, that there is due from John Bonsall to Hannah Hughes, his ward, the sum of one thousand five hundred and thirty-seven dollars and thirty and a half cents, which he is adjudged to pay the said Hannah, together with the costs of this proceeding."

J. R. Ingersoll, for the appellant, after having made a calculation and offered some arguments for the purpose of maintaining the first exception, contended in support of the second exception, that the guardian was entitled to credit for the whole sum charged against him. The evidence did not, he said, exhibit the case of a guardian converting the ward's personal estate into realty, but a transaction in the nature of a partition of the real estate of the ward's ancestor, and a refusal to change it into personalty. In England, for reasons peculiar to that country, it is a general rule not to permit a guardian to change the nature of the property, but it is by no means clear that this may not be done under some circumstances in Pennsylvania. But here nothing of the kind was attempted. The guardian, with the best motives, upon the soundest judgment, and under the most advantageous circumstances, retained the original estate of the ancestor for the benefit of his ward. It is the policy of the law to prevent the conversion of fixed and permanent realty into fleeting and precarious personalty. This can only be done under certain circumstances, and in the particular mode pointed out by statute; while it is fully decided that a guardian may accept for his ward a purpart of the real estate of the intestate, and bind his ward by a recognizance for the payment of the appraised value, to the other children. *Gelbach's Appeal*, 8 Serg. & Rawle, 205. The guardian is only required to give security for the personalty, and when land is turned into money, the precarious character of that species of property induces the court to require fresh security. The Orphans' Court drew incorrect inferences from the acts of assembly to which they *referred, relative to the guardian putting out to interest the money of the ward. Those acts were not intended for the security of the ward, but of the guardian; to

[Case of *Bonsall's Appeal*.]

prevent the judiciousness of his investments from being inquired into, where they had received the previous sanction of the court. Independently of those acts, the guardian has a right to make investments according to his discretion, but is liable to have the soundness of that discretion overhauled. It would be highly disadvantageous to the ward to deny this right. The most advantageous investment is in mortgages, and the guardian is frequently obliged to purchase the property, lest it should be sacrificed. The reason why the rule that the nature of the property shall not be changed, is so rigorously enforced in England is, that it would alter the course of descent; but this reason does not apply in Pennsylvania, where the realty and personalty generally descend in the same channel. *Rook v. Warth*, 1 Ves. 461; *The Earl of Winchelsea v. Norcliffe*, 1 Vern. 435; *Witter v. Witter*, 3 P. Wms. 100; *Reeves' Dom. Rel.* 334, 335.

Purdon, for the appellee.—It is well settled that a guardian cannot change the nature of his ward's estate. He cannot purchase real estate with the ward's money, because, among other reasons, it would divert it from the course of administration, alter its descent, and take away from the ward the power of disposing of it at the age of eighteen, according to Lord Coke, or of seventeen, according to others. *Toll. Law of Exec. Bk.* 2, ch. 4, p. 182; *Hovend. on Fraud*, 442; *Gord. Law of Deced.* 444; 2 *Atk.* 413; 19 *Ves.* 122; *Co. Litt.* 89, b.; *Bing.* 77; 3 *Atk.* 709; 1 *Ves.* 303; 6 *Ves.* 6. The guardian is appointed for the care and management of the minor's estate as it descended to him from his ancestor, until the minor has discretion to assume the management of it himself. This duty negatives the right to alter the nature of the property committed to his care. In some cases such a power has been directly conferred upon the court by the legislature, but in none has it been given to the guardian. One of the principal reasons why a guardian is not permitted to alter the nature of the property; namely, that it would alter the course of descent in case of the minor's death during infancy, is applicable to Pennsylvania as well as to England, though not to the same extent. If this ward had died during her minority she would have left neither father nor mother, but brothers and sisters of the whole and half blood; and the consequence would have been, that the real estate would have gone to her brothers and sisters of the whole blood, while the whole and half blood would have taken the personal estate equally. *Act of 1797, sec. 7, Purd. Dig.* 381. In many other cases the descent of real and personal estate is provided for differently by our intestate laws. 2 *Binn.* 285; *Toll. Bk.* 3, ch. 6, p. 370. Whatever may

[Case of Bonsall's Appeal.]

be the value of the reasoning of Judge Reeves in favour of a change in the law, so as to invest guardians with the power of altering the nature of their wards' estates, it is a clear admission that the law is *not what he thinks it ought to be. [*272] Reeves' Dom. Rel. 334, 335, 337. Besides the reasons urged in support of the rule in England, there is one peculiar to this country, where lands are the subject of speculation, and pass from hand to hand as an article of traffic, almost as readily and frequently as some sorts of personal property. The consequences of permitting him to speculate in his own name with his ward's money, need hardly be pointed out. The property thus purchased may be treated as that of the guardian or ward, according to the successful or unsuccessful issue of the speculation.

The circumstance, that if a partition had been made in due course of law, and the guardian had accepted these lands for his ward, the ward would have been bound, is no argument in favour of the course pursued in the present instance. If such a proceeding were valid, the act of assembly would not only be useless and inoperative, but the interest of parties whom it was intended to protect, would be sacrificed. It would enable the guardian to deprive the eldest son, and the other children in their turn, of the privilege given them by the act, of taking the land at the appraisement. In partition, too, the guardian, if he accepts for his ward, is obliged to pay or secure to be paid to the other heirs, the appraised value of the land; but, by the course pursued in this case, the guardian may, at public sale, purchase them far below their value, without giving any security whatever, except such as may be required by the administrators, with whom he may make the best terms he can. The sureties in the guardian's general bond, would not be liable for the payment, because, he having no power to purchase lands, any misconduct in relation to the purchase, would not be an infraction of his duties as guardian, within the meaning of the bond. *Muir v. Wilson*, 1 Hopk. Ch. R. 512. In *Gelbach's Appeal*, 8 Serg. & Rawle, 205, it is expressly declared, that the guardian, derives the power to accept lands for his ward, from the act of assembly exclusively. To give validity to a proceeding by which a ward is compelled to take a portion of her father's real estate, by the voluntary and irregular act of the guardian, is to dispense with all the guards with which the legislature has surrounded the ward, to defeat the rights of others, and virtually to repeal the whole system of the law of partition, by rendering a compliance with its provisions unnecessary.

Mr. *Purdon* then went into an argument and calculation, to show that the auditor was right in charging the guardian with

[Case of *Bonsall's Appeal*.]

one-third of one-half, instead of one-third of one-third of the purchase-money.

The opinion of the court was delivered by

HUSTON, J.—The facts in this case, and there was no dispute or contrariety of testimony, were as follows:—Thomas Hughes died, leaving nine children, six by a former wife and three by a second wife: of the six, one died after the sale hereafter mentioned, aged eight or nine years.

[*273] *On a petition by the administrators, the Orphans' Court of Berks county, granted an order to sell lands, to pay debts and maintain the children. A tract of seventy-three acres had been exposed to sale, and ninety-nine dollars per acre bid for it by one Allison. The administrators considering this price too low, bid higher, and returned it unsold. Two subsequent orders were obtained, and the land offered for sale. On the second of these in 1819, the eldest son, Edward B. Hughes and James Hutchinson, who was married to the eldest daughter, finding it likely to sell at what they supposed under its value, bid for it. The tract was crying at forty-eight dollars per acre; the administrators refused to strike it down at this price unless they would agree to let the other heirs or some of them be interested in the purchase. This they agreed to, and it was struck down to them and a deed made to them; and they, in pursuance of an agreement to that effect, the next day conveyed one-half of it to John Bonsall, who was guardian of Hannah and two others of the children. Bonsall paid no money, but made three receipts, each for one-third of the purchase-money of the tract, as so much received from the administrators on account of his three wards, and gave them to E. B. Hughes and J. Hutchinson, who handed them to the administrators in payment for the land.

The deed to Bonsall did not state the trust for his wards, but the proof was full, that the agreement and understanding at all times were, that the purchase was for their use, and the payment was as above stated. The place required a house and other improvements: these, by agreement of Bonsall with E. B. Hughes and Hutchinson, were made by E. B. Hughes, who moved on the land, and cost, as he stated, twelve hundred and ninety-three dollars; one half of which was divided by Bonsall among his three wards, and one-third charged to each. The land was sold, subject, it seems, to a dower, and it has produced nothing more than this dower and the taxes since. Bonsall offered to each of his wards a deed for one-third when they came of age, and they refused to accept them. On Hannah's coming of age, he offered to settle his accounts, and the Orphans' Court

[Case of Bonsall's Appeal.]

charged him with the price of the land, and of course, with the improvements, holding that he must keep the land and pay for it, and account for the money and interest.

As we had not the administration accounts, nor the state of the personal or real estate of the intestate before us, there is some difficulty in understanding how lands could be sold for debts, and the purchase-money go, not to pay debts, but to children; and, if sold to support the children, it is not clear how it could be bought by the children and improved by them, and never yield them any rent, and yet they be supported. It appears, however, from the guardian's account, there was other estate; perhaps this land was but a small part of it.

We have not considered this case as clear of difficulty. The doctrine that a trustee cannot go beyond the line of duty prescribed by *law, and make changes of trust property [*274] from money to lands, or lands to money, is well settled; and generally, if the trustee invests money in lands, the *cestui que trust* may, at his option, accept of the lands or refuse them, and demand his money. *Harrison v. Harrison*, 2 Atk. 120. And it is also true, that a trustee will not be allowed for buildings and improvements, even where they are substantial; he is generally allowed only for necessary repairs. 1 Johns. Cha. 27. But this is, as all other general rules must be, subject to exception, when circumstances require an exception, to prevent injustice. Guardians are also a kind of trustees, over whom courts have held a very strict hand: perhaps this is right, and this court does not feel disposed to decide otherwise. But the duty and the power of a guardian are, in this country, peculiar in some respects. For, when a man owning lands, dies intestate, and an application is made to the Orphans' Court for partition or appraisement, and the inquest return that the lands will not divide, and value the whole together or in parcels, a guardian may, if no child takes at the appraisement, either permit the lands to be sold and take his ward's share in money; or, he may take lands at the appraisement, and bind his ward to pay the share or shares of the other children: This has always been done, is contemplated by our laws, and has been sanctioned by this court. *Gelbach's Appeal*, 8 Serg. & Rawle, 205. And, as to improvements, so much of the lands in this state is totally unproductive, unless some means are used to bring them into cultivation or render them habitable, that guardians have, at all times, let lands on improving leases; that is, given a certain number of years to a tenant, for erecting buildings, &c.; and, where the minor has funds, have made buildings such as were absolutely necessary to render lands habitable and productive; and generally this has been allowed without objection. Our act

[Case of Bonsall's Appeal.]

of the 19th of April, 1794, about intestates, authorizes the Orphans' Court to grant orders to mortgage or sell part of the lands to pay debts and maintain and educate the children, and improve the residue of the estate, (see sect. 19.) And in some parts of this state the latter clause is an important one. I do not, however, mean to say a guardian has an authority as to improvements *ad libitum*, or beyond what is clearly necessary.

To apply these remarks to the present case. The guardian did not expend money collected by the administrators, and paid to him, in purchasing lands; but when a part was selling, and a portion of the purchase-money would come to his wards; and when, in the opinion of those children who were of age, it was selling at a great undervalue; when the administrators, one of whom was brother-in-law of the intestate, was so fully convinced of this, that he would not agree to make a sale unless the wards of Bonsall were let in to partake of the advantages to be derived from a purchase at that price; and, when, from all the testimony, and all the argument, it is proved and admitted, that in [*275] making this purchase, or rather, in agreeing to *take a share of the purchase, Bonsall acted, as he and as all their friends believe, for the benefit of his wards, it would seem hard to throw any loss on him. An extraordinary combination of circumstances had raised the price of lands in this state, beyond that at which they would continue. They have since been depressed almost as much below what will settle down as their value. The impression as to the value of lands was not partial; it pervaded all ranks. A few cautious individuals who did not engage in buying, have since assumed credit for much wisdom. No doubt every relation of Hannah Hughes thought this land was sacrificing at forty-eight dollars per acre. The act of the guardian was no more than saying, I will keep it for my wards at that price. If not then sold, and if appraised, he might have taken it at that price, and the law and the decisions of this court would have supported him. And the taking at an appraisement, and joining in a purchase of the lands in which the ward has a share are so much alike, that we think the guardian in this case, on the facts proved and not denied, was justifiable. The conduct of the administrators, their refusing to proceed with the sale, unless Hannah Hughes and the others were to partake in the advantages, is a strong circumstance; more so than the fact that the two who were of age wished to purchase on their own account; it shows that it was considered as giving the land of their father to these three children by means of this order of court, instead of a proceeding to divide or appraise.

[Case of Bonsall's Appeal.]

Much was said at the argument about this piece of land being taken by five or six children, instead of nine; and of the proportion which Bonsall ought to account for in money, if he must account at all. We do not know what other estate there was, nor whether any of it was bought for the other three, nor why the administrators, who insisted on the children being interested in the purchase, agreed to let these five have this land; but, as we have determined that Bonsall is not bound to keep it, the Orphans' Court were wrong in deciding that he must pay Hannah, (whose case alone is before us,) her share in money: we need not discuss this part. The Orphans' Court were right in that part of the case which related to the proportion of Hannah.

As to the rents since the sale, and the buildings, from the decision of the Orphans' Court, it was immaterial for them to consider this part of the case. If Bonsall must keep the lands, he must also be owner of the rents, and pay for improvements; but, from the decision of a majority of this court, these are now subjects of inquiry, and we have not before us enough on which to decide. We do not know whether proper attention and care were exhibited; we do not know whether there was an old house or no house on this land; and we have only the testimony of Edward B. Hughes, who built the new one, as to its being proper for this land, or as to the propriety of its cost; some more specific evidence on these points must be had. And contrary to the usual course in such cases, we remand *this cause [*276] to the Orphans' Court, to inquire and decide as to the conduct of the guardian since the purchase, as to the rents and to the buildings.

TOD, J.—Assenting, as I do, most entirely to the perfect good faith and honesty of the proceedings of this accountant, in point of law, I am not able to concur in the result which the court has come to. It strikes me that the money of the infant has been laid out imprudently; but whether imprudently or not, if illegally, the guardian must, I think, bear the loss himself. The authority relied on by the counsel of Mr. Bonsall, is the case of Gelbach's Appeal, 8 Serg. & Rawle, 205. To my apprehension, Gelbach's case is very unlike the present. There the land had been publicly taken for the infant in the infant's own name. In that case the act of assembly expressly authorized the guardian to bind his ward. According to the practice from the first settlement of the country, a whole farm was taken for a son at the appraisement of a jury; a son who was himself to be a farmer, who probably had no means of living except

[Case of *Bonsall's Appeal*.]

upon a farm, and who had every reasonable prospect of finding the purchase a good one. In the present case, Mr. Bonsall, the guardian, appears to have acted without any, the slightest pretence of authority of law. With the visionary hopes of a great bargain, he enters into a speculation altogether in his own name, purchasing one undivided half of seventy-three acres in Berks county, which land had been part of the estate of the father of his wards, but which had been already sold at public sale by the administrators, under an order of sale by the Orphans' Court for the payment of debts and the maintenance of the minor children of the intestate. This purchase of the half in Mr. Bonsall's own name, was, as it now appears, in trust for the three children, his wards, and he paid for it with their money, or what is the same thing, he gave receipts to the administrators as for so much cash, the purchase-money of the half of the land being seventeen hundred and seventy-two dollars. Thus, in lieu of her money, Hannah Hughes the appellee, is now presented with a title to one undivided sixth part of seventy-three acres in Berks county : a sort of property, which, in my opinion, no rule of law or equity will oblige her to take.

The case, if it stopped here, would, I think, be conclusive in favour of the appellee. But, so far from stopping here, Mr. Bonsall went on to lay out almost the whole of the residue of the money of the three infants in building a new house on the land, the children's half of the cost of the house being six hundred and forty-six dollars and fifty cents, cash expended, not as I understand it, by the guardian, but at least forty miles from his residence ; of course not under his view, nor under the view of anybody else accountable as guardian, but by Edward B. Hughes, one of the partners in the purchase, who occupied the house and the farm some four or five years, paying nothing except the taxes and the interest of the widow's third. [*277] According to his affidavit, the farm was not such as would yield any clear profit. And there is no doubt of the correctness of his statement, because the tenant who came after him, has, for years, held and still continues to hold the farm, new house, and all, merely keeping it in repair, paying the taxes, and the interest of the widow's share ; so that the speculation appears to end in this : Hannah Hughes, instead of her money, which, with interest, would amount to more than twelve hundred dollars, is offered a deed for one undivided sixth part of a house and farm, which, admitting what I suppose to be very doubtful, if not impossible, that the girl could attend to it herself, and be able to hold her own beset by so many partners, yet can produce during the widow's life, no clear profit to the

[Case of Bonsall's Appeal.]

amount of a grain of corn ; and, after the widow's death, judging from all former rents, provided no accident happens, and provided no repairs of the buildings are wanted, will yield to Miss Hughes something less than one per cent. on the money, which, without this purchase by her guardian, would be now fairly in her hands. I believe there is no possible case which can authorize the throwing of such a bargain upon an infant.

As to the necessity imposed upon a guardian to interfere to prevent the sacrifice of an estate, I would observe, this purchase by Mr. Bonsall, was a month or so after the public sale by the administrators. At any rate, from the proofs in the cause, there is not the least ground to suppose that money was wanted. Actually, the sale appears to have been upon credit. But, suppose it to have been compulsory, I would still insist that a guardian cannot be permitted to expose the whole patrimony of one child to the risk of destruction, to prevent imaginary loss to an estate in which that child has but a ninth share.

There are some matters which, perhaps, the affidavits do not sufficiently explain : for instance, it might seem that Messrs. Hughes and Hutchinson, the original purchasers, had not the same faith in the profits of the bargain, which Mr. Bonsall appears to have had. After getting a complete title, in the very next month, they gave up one full half of their purchase to Bonsall, without asking any premiums. I was at first concluding that this might have been done, because, they had promised the administrators to let the rest of the children into a share of the profits. But that cannot be. There was no promise that any children should have more than their equal share, and the three wards of Mr. Bonsall have been loaded with one-half of the whole bargain, when, if the promise was the motive, three-ninths of the speculation was all that could have been allotted to them.

The policy of the law, and a due regard to the protection of infants, seem to require that good intentions shall not excuse a guardian who takes in hand to risk his ward's money without authority. But, granting such excuse may be received in some cases, the peculiar circumstances of this case are such, though they leave not *the least stain upon the moral conduct [*278] of Mr. Bonsall, yet that we cannot, by any means, in my opinion, permit him to throw this heavy loss from himself by setting up a parol trust against the infants, contrary to his own recorded deed. If we can, then it seems to me that other men, totally different from Mr. Bonsall, that any guardian,

[*Case of Bonsall's Appeal.*]

trustee, or executor, having in his hands the money of infants, may, in times of speculation, be permitted to lay out that money in this mode of preparation for either event, and be doubly armed with proof; first with a deed recorded, showing the title in himself, and thus exposed to the temptation, and holding the power of claiming the profits for his own use, if any profits there are, having at the same time, in reserve for the event of a loss, parol declarations of trust to be proved by men whom the executor or guardian well knows, but whom the infants may never be able to find out. Even in the present case, where there is not the least ground of suspicion of intended unfairness, suppose the land which had been conveyed to Mr. Bonsall at the price of seventeen hundred and seventy-two dollars, had been sold the next year for three thousand dollars, and Bonsall had died and the witnesses had died or removed from the country, or had forgotten the words spoken, or were unknown to the infants; what possible chance would they have had against the record and against the statute of frauds? The recorded deed states, the purchase-money to have been paid by Mr. Bonsall; it conveys the land to him and his heirs, "to the only proper use and behoof of him, the said John Bonsall, his heirs and assigns for ever." Nothing was recorded, nor even written, showing the least trace of property in the infants; and not until six years afterwards, when the whole bargain had gone to perdition, does Mr. Bonsall make a deed throwing the legal title off of himself, upon his three wards. This is a delay, a negligence, which, if there was nothing else in the case, ought, in my opinion, to subject him to the whole loss.

It is said by the appellant's counsel, that the Orphans' Court have, upon their own principles, erred in charging him with one-third of one-half of the purchase-money of the seventy-three acres: Whereas, at most, it could be but one-third of one-third, that being Hannah's share in her father's estate. Evidently there is no such mistake. Hannah had other property in the hands of her guardian, and with it he purchased for her, not one-ninth part, but one-sixth part, of the seventy-three acres. If the purchase is left upon his own hands, as the Orphans' Court decided that it ought to be, he then holds one-sixth part of the land intended for Hannah, and is liable to her for one-sixth part of the purchase-money. In one word, whatever money of hers he has received, or ought to have received, he is accountable for, and must restore in money, and not in real estate.

[Case of Bonsall's Appeal.]

Therefore, in my opinion, the decree of the Orphans' Court should be affirmed.

Cited by Counsel, 1 Penn. R. 210; 4 R. 154; 5 R. 327; 3 W. 370; 7 W. & S. 112; 2 Barr, 279; 3 Barr, 322; 1 J. 39; 3 C. 111; 11 C. 421; 12 C. 97; 5 S. 116; 10 S. 121; 4 N. 361; 7 N. 201; 3 O. 367; 7 W. N. C. 530; 11 W. N. C. 293.

Cited by the Court, 8 W. 22; 9 W. & S. 134, and commented on and explained, 3 R. 55.

This case, as explained in 3 R. 55, was a case of *not* converting, and as pointed out in Savings Fund's Ap., 26 S. 203, a guardian, in such matters, is not bound to such diligence as are trustees for collection and disbursement.

END OF MARCH TERM, 1829—EASTERN DISTRICT.

CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

LANCASTER DISTRICT—MAY TERM, 1829.

[LANCASTER, JUNE 1, 1829.]

Hartman *against* Dowdel, with notice to Hawk.

IN ERROR.

An assignment by a husband of his wife's choses in action, as a collateral security, does not deprive her of the right of survivorship, in case he dies before they are reduced to possession.

ON a writ of error to the District Court of *York* county, this appeared to be an amicable action for money had and received by Michael Dowdel, Esq., sheriff of the county, for the use of John Hartman, the plaintiff.

The following case (to be considered as a special verdict,) was stated for the opinion of the court below, on which judgment was rendered for the defendant.

CASE.

"On the first day of January, 1816, Rudolph Spangler died, leaving, among other children, Margaret, intermarried with John Hawk, and leaving real estate, which was sold by William Johnson and Barnet Spangler, administrators of the said Rudolph Spangler, deceased, (the heirs having refused to take the same at the valuation agreeably to the provisions of the act of assembly,) on gales; after which the said John Hawk and his said wife Margaret, executed to John Hartman, the plaintiff, the annexed power of attorney on the day of its date, and for the consideration therein mentioned. And on the 1st day of January, 1820,

[Hartman v. Dowdel, with notice to Hawk.]

the said John *Hawk, deceased, and after his death, to [*280] wit : on the 31st day of January, 1823, there came to the hands of the said William Johnson and Barnet Spangler, of the proceeds of the sale of the said real estate to be paid to the said Margaret or such other person as was entitled to receive the same in her right, (as her share in the hands of said administrators,) the sum of ninety dollars, to recover which, a suit was brought in the Common Pleas of York county, by the said Margaret Hawk against the said William Johnson and Barnet Spangler ; and on the 8th day of August, 1826, judgment was duly rendered in the said suit, for the plaintiff, for one hundred and nine dollars, being the amount of principal and interest ; on which judgment, the plaintiff issued a *fiery facias*, which was executed by the defendant as sheriff of the county of York, and on which he raised and has in his hands, to be paid to such persons as may be entitled to receive the same, one hundred and fourteen dollars, which he refuses to pay over, the same being claimed by Margaret Hawk in her own right, and also by the said John Hartman, by virtue of the annexed power of attorney. If the said power of attorney be sufficient to entitle the said John Hartman to the money in question, then judgment to be entered for the plaintiff for the said sum of one hundred and fourteen dollars, otherwise for the defendant."

The power of attorney referred to was as follows :

" Know all men by these presents, that we, John Hawk and Margaret, his wife, late Margaret Spangler, one of the heirs of Rudolph Spangler, deceased, have made, constituted, and appointed, and, by these presents, do make, constitute, and appoint, and in our place and stead, do place and depute our trusty friend, John Hartman, of the borough of York, tailor, our true and lawful attorney for us, and, in our names, for his use, to ask, demand, sue for and recover, and receive of and from Barnet Spangler and William Johnson, administrators of all and singular, the goods and chattels, lands and tenements, of the said Rudolph Spangler, deceased, all such sum and sums of money, legacies, debts and duties whatsoever, which now are due or hereafter to become due, out of and from the real and personal estate of the said deceased, until such time or times as he will be fully paid and satisfied, for the sum of seven hundred and forty-one dollars and eighty-one cents, for which sum he hath obligations, and the further sum of two hundred dollars which we are in due him, with lawful interest on the latter sum, if so much is or shall be coming to us out of the said deceased's estate, and to have, use, and take all lawful ways and means, in our name or otherwise, for the recovery thereof, by attachment, arrest, distress, or otherwise, and to agree and compound for the same, and acquittances or

[Hartman v. Dowdel, with notice to Hawk.]

other sufficient discharges for the same for us, and in our names to make, seal and deliver, and to do all other lawful acts and things as fully in every respect as we ourselves could do if [*281] *personally present, and attorneys one or more under him, for the purposes aforesaid to make, and at his pleasure to revoke, ratifying, and allowing all and whatsoever our said attorney shall in our names do or cause to be done in and about the premises by virtue of these presents, and as soon as our attorney shall have received his just claims, to account with us for the same and irrevocable until that time."

Durkee, for the plaintiff in error, contended, that the power of attorney from Hawk and wife to the plaintiff, was an equitable assignment to the latter, of the debt due to the wife, and a sufficient appropriation of it to make it his. Under these circumstances the death of the husband was no revocation of the power. 2 Vern. 559; 1 Eq. Ca. Ab. 45.

Barnitz, contra, answered, that although the power of attorney was certainly irrevocable during the life of the husband, yet after his death, his dominion over his wife's choses in action ceased, and the plaintiff standing in his place, is not entitled to recover. He cited Prec. in Ch. 125; 8 Wheat. 175, 201; Co. Litt. 52; Wills. 105, 565.

The opinion of the court was delivered by

GIBSON, C. J.—A letter of attorney may be irrevocable, and contain an assignment of the thing, to be recovered, as undoubtedly was the case here. It is certain also, that any disposition of a wife's chose in action which is substantially an assignment for valuable consideration, will bar her right. The assignee, however, must be a purchaser, else he will stand in the place of the husband, and failing to reduce the chose to possession in the lifetime of the husband, the wife's right will survive. In other words, the husband may sell his wife's chose in action, but cannot give it away freed from the incidents of the marriage. This distinction rests on the indisputable authority of *Burnett v. Kinnaston*, (2 Vern. 401;) *Garforth v. Bradley*, (2 Ves. 675;) *Bates v. Dandy*, (2 Atk. 207,) and many other cases. In *Jewson v. Moulson*, (2 Atk. 417,) Lord Hardwicke says it is difficult to reconcile the cases on the subject of the wife's property in action, but that one thing is clear throughout, if the husband make a voluntary assignment of it, the assignee will stand in the place of the husband. And in *Packer v. Wyndham*, (Prec. in Ch. 412,) the reason is said to be because a

[Hartman v. Dowdel, with notice to Hawk.]

chose in action is not assignable at law ; and, without a valuable consideration paid, equity will not interpose against the conjugal rights of the wife. An equitable assignment is a declaration of trust, (Co. Litt. 232, note 1,) or rather an agreement that the assignee shall receive the money to his own use, which equity will execute, or not according to circumstances, (Pow. on Cont. 191, 192,) but never in favour of a bare volunteer, except against the assignor or those claiming under him, (1 Fonb. 203,) and not consequently against a wife, who claims paramount. Hence, I apprehend, the difference between *an equitable assignment which requires payment of a consideration, and a release which is effectual at law without receipt of the money. [*282]

That an assignment in discharge of a debt is on a valuable consideration, and that an assignment as a pledge or collateral security is not, was decided by this court in *Petrie v. Clarke*, (11 Serg. & Rawle, 377.) Now what consideration was there here? The assignment was clearly as a collateral security, the assignor remaining liable till the debt should be discharged by actual payment. No other terms were imposed than that the assignee should account for the surplus after satisfaction had. The assignment neither was a benefit to the assignor, nor a prejudice to the assignee. It rested on a moral obligation which binds to payment of debts, and which, though a good foundation for an express contract, would be insufficient to raise a promise by implication of law. The assignment, therefore, was on good consideration merely, which is insufficient to sustain it against any one but the representatives of the assignor.

Judgment affirmed.

Cited by Counsel, 1 Penn. R. 374; 2 Ash. 460; 4 W. 127; 6 W. 132; 7 W. 119; 1 W. & S. 255; 3 W. & S. 282, 458; 4 W. & S. 19; 7 W. & S. 169; 3 Barr, 138; 5 Barr, 263; 10 Barr, 374; 4 H. 369; 9 H. 249; 15 S. 398; 27 S. 381; 3 O. 205; 1 W. N. C. 45; 1 W. N. C. 148.

Cited by the Court, 5 Barr, 140; 10 Barr, 195; 7 C. 233; 3 Wr. 357; 4 Wr. 43; 23 S. 162; 2 N. 249; s. c. 4 W. N. C. 87; 8 N. 417; s. c. 7 W. N. C. 187; 4 W. N. C. 350.

Discussed by the Court, 4 R. 470; 6 N. 108.

The principle of this case was examined at length, and, after a careful review of the English authorities, affirmed, in 4 R. 470.

The peculiar facts of that case, however, led the court to establish an exception, and it was held that a voluntary assignment by the husband of the wife's choses in action in trust for the wife, was such a disposition of them that a subsequent husband could not claim them as against the wife.

An assignment by a husband in trust for creditors will not carry his wife's choses in action, unless they are expressly included: 10 Barr, 373; nor will an assignment by him under the insolvent laws: 1 H. 560. Where the first assignment purports to be for value, a second assignee for value is protected: 4 H. 365.

[Hartman v. Dowdel, with notice to Hawk.]

An assignment by the husband of his wife's *choses in action*, as collateral security for a note given for money borrowed at the time, bars the wife's right if the husband die without paying the debt and freeing the collateral: 7 C. 228. And it was held, even before the Act of 1848, that a husband who had not reduced into possession his wife's personalty could not will it away from her: 6 N. 105.

[LANCASTER, JUNE 1, 1829.]

The Commonwealth *against* Aurand.

APPEAL.

Under the provisions of the act of the 30th of March, 1811, to amend and consolidate the several acts relating to the settlement of public accounts, &c., it is not necessary that an account should be revised and examined by the state treasurer in person. It may be done by deputy.

APPEAL by the defendant from the decision of Rogers, J., holding a Circuit Court for *Berks* county. Action of assumpsit. Plea *non assumpsit*. The suit was to recover the alleged amount of militia fines in the hands of the defendant, as late deputy marshal. By act of Congress of the 4th of May, 1822, all the right of the United States to fines assessed upon citizens of the state of Pennsylvania for non-performance of militia duty, during the late war, were vested in the said state, to be recovered by the same, under such regulations, provisions, and restrictions, as shall be prescribed by the legislature thereof. Whereupon, by act of assembly of the 1st of April, 1823. (Pamph. Laws, 1822-3, page 274,) the auditor-general was "authorized and required to take legal measures to recover all moneys in the hands of those who now are, or heretofore have been marshals, or deputy marshals, or which may be in the hands of their legal representatives, which may have been collected from the fines aforesaid, after deducting the expense of assessing and collect-

[*283] ing the same; and also to settle and adjust the *accounts of the said marshals and deputy marshals, for moneys by them collected as aforesaid, under the provisions of the act of the 30th of March, 1811, entitled, 'An act to amend and consolidate the several acts relating to the settlement of the public accounts and the payment of the public moneys, and for other purposes,' and for this purpose he is hereby authorized and required to exercise the same powers for compelling the said marshals and deputy marshals, or their legal representatives, to render their respective accounts, and for procuring the attendance of persons, whether party or witnesses, and the exhibition

[The Commonwealth v. Aurand.]

and delivery of books, accounts, documents, and papers which have any relation to or connection with the said accounts or fines, and which he may deem necessary in the investigation and adjustment of the same, as are or may be exercised in the case of other debtors or delinquent public officers of this commonwealth: Provided, that no proceedings shall be instituted against them or any of them, previous to the 1st day of August next: And, provided, also, that in settling and adjusting the accounts aforesaid, the accounting officers shall allow a credit to the several marshals and deputy marshals, for all sums heretofore paid by them to the officers composing the courts-martial, held under the authority of the laws of the United States, and the laws of the commonwealth of Pennsylvania, for the trial of delinquent militia men."

The copy of the account given in evidence, was as follows :

"Peter Aurand, Esq., late deputy marshal for the counties of Berks and Schuylkill, in account with the commonwealth of Pennsylvania, for fines recovered from the citizens of this state for non-performance of militia duty during the late war with Great Britain.

Dr.

"To amount of fines recovered in the 2d Brigade, 6th Division, P. M. List 1,	\$14,528.00
"To amount of fines recovered in the 95th Regi- ment, 1st Brigade, 6th Division, per List No. 2,	3,200.00
"To amount of fines recovered in the 143d Regi- ment, 1st Brigade, 6th Division, per List No. 3,	2,801.00

Cr.

\$20,529.00

"By cash paid John Smith, Esq., Mar-
shal, per receipt dated 20th of June,
21st, 1827, No. 1, \$2,000.00

"By cash paid John Smith, Esq., Mar-
shal, per receipt dated 22d of April,
1818, No. 2, 5,000.00

*"By amount paid to officers of Court
Martial, 2d Brigade, 6th Division, . 5,756.95 [*284]

"By amount paid to officers of Court
Martial, 143d Regiment, 1st Brigade,
6th Division, 428.51

[The Commonwealth v. Aurand.]

"By amount paid to officers of Court Martial, 95th Regiment, 1st Brigade, 6th Division, No. 3,	188.59½	
"By attorneys' fees on suits brought against the Deputy Marshal, No. 4, .	50.00	
"By amount paid for postage, printer's bills, &c., per No. 5,	81.71	
"By commissions on \$13,529.00, at five per cent.,	676.45	14,182.21½

Due Commonwealth, \$6,346.78½

"Settled and entered David Mann. Auditor General's Office, November 1st, 1825.	}	Approved and entered. A. M. Piper for William Clark, Treasurer. Treasury Office, November 1st, 1825.
"November 1st, 1825.		Auditor General's Office.

"I certify the foregoing to be a true copy of the original remaining on file in this office.

"Witness my hand and seal of office the day and year aforesaid.

DAVID MANN.

"Auditor General."

The verdict was for the commonwealth for damages and interest seven thousand five hundred and seventy-six dollars and ninety-seven cents; his honour, the judge, having decided on the trial, that the account was sufficient to support the action, that the settlement, not having been appealed from, was final and conclusive, and that the same was sufficiently approved and entered at the treasury office. He therefore refused a new trial, which was asked for by the defendant, and this decision was the error complained of.

Darling, for the defendant.—The questions are two: 1st, were the accountant officers, in their summary jurisdiction against Aurand, bound to proceed under the provisions of the act of the 30th of March, 1811? (5 Sm. L. 228; Purd. Dig. 690.) 2d. Have they so proceeded?—By the act of 1823, the power is not given to the auditor general singly. Reason and justice would seem to require, that debtors to the state, by assignment and transfer, [285] should *have means of protection equal with others. But the express words of the act can leave no doubt. The auditor general shall take legal measures for the collection of the fines, and shall settle and adjust the accounts of the marshals and deputy marshals, under the provisions of the act of the 30th of March, 1811, entitled an act to amend, &c., and shall exer-

[The Commonwealth v. Aurand.]

cise the same powers as may be exercised in the case of other debtors and delinquent officers of the commonwealth. Then, have the terms of the act of 1811 been complied with? The third section directs, that any public account examined, adjusted, and entered, by the auditor general, shall, together with the vouchers and all other papers and information appurtenant thereto, be submitted to the state treasurer, for his revision and approbation; and, in order that the state treasurer may be enabled to revise and examine the accounts so submitted to him, he is hereby invested with powers similar to those vested in the auditor general by this act. The powers thus given to the state treasurer are mentioned in the second and fourth sections; and among them is the power to enforce the production of books, accounts, and documents, and the appearance of parties and witnesses on pain of imprisonment. By the 12th section, "the balance due to the commonwealth, on every account settled agreeably to this act, shall be deemed and adjudged to be a lien from the date of the settlement of such account on all the real estate of the person or persons indebted, and on his or their sureties throughout this commonwealth." By the 5th section it is made the duty of the state treasurer "to return such accounts, vouchers, &c., to the auditor general, within a reasonable time, signed by him, if he approve thereof; but if he disapprove of any account, he shall state, in writing, the reasons for such disapprobation; and if, upon reconsideration of the account so disapproved of by the state treasurer, the auditor general and state treasurer cannot agree, it shall be the duty of the auditor general to lay the account, and vouchers, and other papers appurtenant thereto, before the governor, together with his own reasons and the reasons of the state treasurer respecting the same, and the decision of the governor thereon shall be conclusive as to the said officers, &c."

Now, it appears that, in this case, the balance against Aurand is fixed, by the auditor general, and by A. M. Piper, for William Clark, treasurer, when it is not stated, nor can it be known judicially under what pretence of authority A. M. Piper acted. The treasurer is appointed by the legislature. There is no power of delegation in the act of assembly. If he can thus be permitted to throw off his responsibility, the auditor general may do the same; and, if this is lawful, two of the clerks in the office may enter a judgment, binding upon the real estate of every debtor, or supposed debtor, and their sureties, throughout the commonwealth. If the two clerks happen to differ in opinion, is the governor to be called on to settle the dispute between them, and may he also delegate his authority to another? Here

[The Commonwealth v. Aurand.]

[*286] the act to be done required talent, knowledge, *responsibility. If to pronounce a judgment binding upon real estate throughout the commonwealth, *ex parte* in some cases, and without appeal in others, is not a judicial act, it will be difficult to name an official act which cannot be performed by deputy or substitute. The rules of law on the subject will hardly be contested. A judicial officer cannot make a deputy, because his judgment is relied on. 5 Bac. Ab. Offices and Officers, L. All holding judicial authority must hold their courts in their proper persons, and cannot depute, nor in any way transfer their power to another. Ibid. A coroner cannot make a deputy, nor an escheator, because they are judicial offices, which they must exercise in person. Ibid. Justices of the peace cannot delegate a certain number of themselves, and invest them with a power to make rates and orders. Ibid. One holding the office of clerk of the papers cannot make a deputy; for it requires knowledge and skill. 16 Vin. Ab. title Officer, J. 11. An office which concerns the king's revenue, cannot be executed by deputy. Ibid. 12. Sheriff must execute a writ of partition in person; so a writ of inquiry of waste, admeasurement of dower, and a writ of re-disseisin; for he is in *loco judicis*. 6 Bac. Ab. Sheriff, H. 3.

Smith and Buchanan, for the commonwealth.—Under the act of 1823, no approbation of the state treasurer was necessary to this settlement of Aurand's account. If it was necessary, such approbation has here been sufficiently given in the name of A. M. Piper, chief clerk. The state treasurer is not mentioned in the act of 1823. By this act all the powers vested, by the law of 1811, in the three officers, including the governor, are conferred on the auditor general alone. But, supposing further approbation to have been necessary, here it has been given. By the same act of 1811, sect. 42, in case the state treasurer shall die during the recess of the legislature, the chief clerk in the treasurer's office, having taken the oath or affirmation of office, and given the requisite security, shall be authorized to do the duties of state treasurer, until another shall be appointed by the legislature. The authorities cited against us are, some of them, not applicable, and some of them are not law in Pennsylvania. Who here ever doubted whether a coroner can appoint a deputy? We have a common law of our own, which has grown up with the growth of the state. *Commonwealth v. Greason*, 5 Serg. & Rawle, 333. A deputy clerk of the peace may administer the oath on registering a slave. In *Reigart v. M'Grath*, 16 Serg. & Rawle, 65, a deputy of the clerk of the Mayor's Court administered the oath on the appeal, and it was held good. In

[The Commonwealth v. Aurand.]

the commonwealth for use of *Allen v. Finney*, at the last term of this court, in this place, it was decided, that a recognizance, taken by a mere clerk in the office, was valid; yet taking a recognizance is called a judicial act. 1 P. Wms. 334. The deputy prothonotary appoints arbitrators, taxes bills of costs, enters judgments. The mode of settling public accounts, adopted in this case, has been in use for *a series of years. It is [*287] a practice dictated, not by convenience only but by necessity. The doctrine, and the reason for it, is fully developed, by the Chief Justice in *Reigart v. M'Grath*, 16 Serg. & Rawle, 65. And the same necessity has produced a similar change in England. There, even as to sheriffs, it is admitted to be impossible that the high sheriff should execute every duty personally, and that therefore the deputy must have the same powers. He may make bills of sale, return executions and other writs, and, generally, do everything which the sheriff himself can do. 6 Bac. Ab. Sheriff, H. 3. And per Lord Mansfield, a mere clerk of the deputy was permitted to make a valid assignment of a bail bond, where it appeared that such was the usual practice. *Ibid.* A deputy sheriff may hold an inquest of damages. 2 Johns. Rep. 63. Now, if arguments of convenience and necessity apply to the offices of prothonotary and sheriff, they apply much more forcibly to the present case. The operations of government may be stopped upon the rules of strictness here insisted on. Except fixed salaries, no money could be paid, and none received, at the public treasury, in case of sickness or absence of the auditor general or treasurer. Though it is believed, in point of fact, that the treasurer never investigates an account, or examines the vouchers, unless for some special reason, or unless the party implicated makes objections, yet we contend that if his duty required him to investigate, in this case such duty will be presumed to have been done. The entry by another hand will be supposed to have been by directions of the chief officer till the contrary appears. Here the account has been returned to the auditor general from the treasury office, which implies the approbation of the treasurer. Besides, there is no appeal by Aurand: no application to correct mistakes, which, by the act of 1811, might have been done within a year if any mistakes existed. That to settle an account requires discretion is admitted: that it is a judicial act is denied. These officers give security for performance of their duty; which is never given by judges. No one has heard of a judicial officer, in case of death, being succeeded by the chief clerk. If the deputy or substitute does anything injurious, the principal shall answer. 5 Bac. Ab. Offices, L.

[The Commonwealth v. Aurand.]

Baird, for the defendant, in reply.—The operations of government will not be interfered with by a reversal. It is not a question about a payment due by the commonwealth to an individual. It is the case of a very high and extraordinary judicial power delegated to those who are not otherwise judicial officers: a power claimed to pronounce a decree, *ex parte*, binding and conclusive, and which is to be incontrovertible by any evidence whatever, and a lien from its date throughout the commonwealth, not only upon the party who may, perhaps, have had notice, but upon his sureties, without the least pretence of notice to them. The question is, whether such decree can be given except by those to whom the power is expressly and exclusively [*288] given by the act of assembly. *Suppose in fact, what does not appear, nor is attempted to be shown, that the state treasurer was disabled by sickness or otherwise from deciding personally in this case, still we contend that the special and great prerogative of obtaining a judgment without a trial, must be exerted in the manner and under the conditions prescribed by the legislature: otherwise the commonwealth must be content with the usual remedy of suing in the courts of law. The sentence of the auditor general alone, can create no lien. The 42d sect. which has been relied on, enabling the chief clerk to act upon the death of the treasurer, upon taking the oath of office and giving security, proves that such death, oath, and security, are necessary to qualify him to act at all as state treasurer. Costs are given by the law and the judgment of the court; and because the clerk of the prothonotary may tax the bill, it will hardly follow that he may give judgment by default, for debt and costs both, under pretence that the judge cannot be upon the bench. We deny the existence of any necessity for pronouncing a summary judgment against a supposed debtor to the state, by any officer or clerk not authorized. The counsel for the commonwealth seem not much to have relied on the act of 1823, as giving the power to the auditor general alone. That act expressly directs the accounting officers to give credit, &c. It declares in so many words, that the proceedings shall be under the act of 1811. The officers in this case have affected to act throughout under the act of 1811, except that another person, without any authority has undertaken to decide the cause and pronounce the decree, instead of the treasurer, who was assigned by the law to that duty. A copy of the account has been given in evidence under the act of 1811. Interest after three months, is charged under the act of 1811. A priority of lien upon Aurand's land is asked for and enforced under the same act; no other law exists giving such priority. Practice and usage in the offices have been mentioned. Without

[The Commonwealth v. Aurand.]

admitting any such usage, we say if such usage exists, it is as directly against every principle of justice, as it is against the words of the law, and ought to be abolished. But we deny the usage itself. No instance is shown of an attempt previous to this case, to enforce a judgment against a public debtor rendered by the auditor general and a clerk of the treasurer.

GIBSON, C. J., delivered the opinion of the court.

I consider the point made here as already determined, there being no difference between the present case and *Reigart v. McGrath*, except that the necessity which dictated the practice there was not near so urgent. Were the powers of the treasurer limited to a discharge of his duties in person, the whole fiscal concerns of the government would suffer derangement: an evil not to be endured. The existing practice is shown to be coeval with the constitution; and if the legislature, having the appointment of the officer committed to it, and the superintendence of his business peculiarly within its province, has thought fit to acquiesce, it would be an [*289] unwarrantable exercise of power in favour of a supposed theoretic principle for this court to declare settlements like the present void, and thus impair the title of the state to millions received or secured through their instrumentality. There is, however, no principle with which the practice is not in strict accordance. The adjustment of an account is no further judicial than the taxation of a bill of costs, which may, unquestionably, be by the prothonotary's clerk. In regard, however, to the militia fines transferred by the act of congress, passed the 4th of May, 1822, it is perfectly clear that the auditor-general is not, as has been contended, exclusively the officer to settle the accounts. By the act of assembly passed the 1st of April, 1823, the accounts are subjected to all the provisions of the general law of 1811; but the allowance of the account by the treasurer being unquestionably valid in this particular instance, there is no pretence for sending the cause to another jury.

TOD, J., dissented.

Judgment affirmed.

Cited by Counsel, 3 Barr, 324; 3 C. 274; 13 W. N. C. 479.

Approved and followed, 8 W. 63; 2 S. 454; 12 W. N. C. 329; 13 W. N. C. 479.

It was said, in 12 W. N. C. p. 329, that this case had probably governed the practice for fifty years, and that under it all ministerial acts might be done by the deputies in the state offices. Therefore, under the Act June 7, 1879 (p. l. 113), the clerks can assess the tax on corporations after the latter have made their reports, and it is no defence to these taxes that they were not examined and confirmed by the attorney-general and state treasurer in person: *Hamilton Co. v. Commonwealth*, 12 W. N. C. 328; *P. & R. R. R. v. Commonwealth*, 13 Id. 478.

[LANCASTER, JUNE 1, 1829.]

Wike *against* Lightner.

IN ERROR.

A writ of error does not lie to the Circuit Court.

THE plaintiff in error was defendant below, in an action of ejectment. A verdict having passed against him in the Circuit Court of *Lancaster* county, held by Huston, J., he sued out a writ of error which *Buchanan* now moved to quash.

In support of the motion, *Rogers* and *Buchanan* contended, that a writ of error does not lie to the circuit court where the party has a remedy by appeal, which he had in the present instance. Act of the 20th of March, 1799, sect. 4. By the act of the 8th of April, 1826, sect. 1, circuit courts are revived, and the whole system called again into action precisely as if the act of 1799, had never been repealed, and under that act the remedy given to the party who thought himself aggrieved by the judgment of the Circuit Court, was an appeal in the manner therein prescribed. The act of the 11th of March, 1809, sect. 6, *Purd.* 416, points out the courts to which a writ of error may be taken, and those also from which an appeal lies, which it has been determined does not lie from the Common Pleas. *Lessee of McClemons v. Graham*, 3 *Binn.* 88. Where an appeal is given by statute, it is an implied repeal of the writ of error. It has therefore been decided in *Massachusetts*, that a writ

[*290] of error does not lie to the Common Pleas in those cases in which an appeal is given. 4 *Mass. Rep.* 171, 516; 6 *Mass. Rep.* 4; 9 *Mass. Rep.* 228; 11 *Mass. Rep.* 300, 512. The circuit courts are intended as a substitution for the courts of *Nisi Prius*, the appeal being a mode of getting the motion for a new trial in arrest of judgment, &c., before the court in bank. Act of the 17th of March, 1722, 1 *Sm. L.* 139, 140; Act of the 28th of January, 1777, *Ibid.* 247; Act of the 25th of September, 1826; Act of the 13th of April, 1791, 3 *Smith's Laws*, 28. On an appeal from the decision of the Circuit Court upon a motion in arrest of judgment, the Supreme Court is in the same situation as the judge of that court when the motion was made, and may direct the verdict and judgment to be entered as he might have done. The act of the 21st of March, 1806, sect. 13, 4 *Sm. Laws*, 332, is conclusive upon

[Wike v. Lightner.]

the question. It declares that common law remedies shall be superseded in all cases where a remedy is provided by act of assembly.

Hopkins, contra, said that a writ lies to every court of record which proceeds according to the course of the common law. The jurisdiction of this court cannot be taken away by implication. The Court of Errors and Appeals had a supervising power over the Supreme Court. Act of the 13th of April, 1791, sect. 16, 3 Sm. L. 32. Error will lie even to a court of *Nisi Prius*.

The opinion of the court was delivered by

GIBSON, C. J.—In substituting circuit courts for courts of *Nisi Prius*, to which a writ of error did not lie, no alterations were intended but such as should be necessary to accomplish two things—to enable the judge who tried the issue, to render judgment, and to restrict the lien of it to the county in which the record should be. Hence an appeal was particularly provided, and doubtless to preserve to the court in bank, the immeasurable advantages which, as a means of correction, the motion for a new trial affords in comparison with the writ of error; and hence it would be fair to imply the abrogation of the latter on the ground of intention. But this construction which has been sustained by the Supreme Court of Massachusetts, on the basis of reason and good sense, is expressly enjoined by our legislature, who have subsequently declared that remedies provided by act of assembly shall be used in exclusion of remedies at the common law. How this happened to be thought inapplicable to civil proceedings, would not be understood by any one who did not know with what reluctance the courts executed laws that were, at one time supposed to be aimed at the profession. Its terms are broad and sweeping; and it is part of an act which has entirely changed the form of proceeding in debt, assumpsit and ejectment. Of its object, those who remember the temper of the times, can best judge. But whatever may have been the reluctance of the courts then, we cannot refuse now to [*291] execute the plain mandate of the legislature. There is no escape from it here but by showing that there may be error, for which the appeal affords no remedy; and were any such imaginable, we would be bound to allow the writ for its special correction. But an appeal may be taken in every case of “demurrer, special verdict, case stated, point reserved, motion in arrest of judgment, or for a new trial, or to set aside a judgment, discontinuance, or *non pros*,” and it is therefore more extensively remedial than even the writ of error. As, then, it

[*Wike v. Lightner.*]

is adequate to all the purposes of redress, recourse is to be had to it exclusively.

TOD, J., dissented.

Writ of error quashed.

Cited by Counsel, 2 Par. 555; 6 W. 385; 1 S. 98.

Cited by the Court, 1 M. 44, 197; 2 M. 63; 2 Par. 351; 6 Wh. 591; 1 N. 453; 11 N. 145; 5 O. 295; 3 W. N. C. 246; 8 W. N. C. 123.

[LANCASTER, JUNE 1, 1829.]

The Commonwealth *against* Clarkson, Administrator of Passmore.

APPEAL.

Mutual demands extinguish each other by operation of law, without actual defalcation by the act of the parties.

Therefore, where a prothonotary and a sheriff received fees for each other during their continuance in office, the fees received by the prothonotary for the sheriff, against which he was entitled to set off money received by the sheriff for him, were held to have been fees received by the prothonotary while in office, and liable to taxation under the act of the 10th of March, 1810, although no actual settlement of accounts took place between them until long after the prothonotary had gone out of office.

APPEAL from the decision of the Circuit Court of *Dauphin* county.

The accounts of the defendant's intestate, John Passmore, who had been prothonotary of the Supreme Court for the Lancaster district, and of the Court of Common Pleas of Lancaster county, and clerk of the Orphans' Court, Quarter Sessions, and Oyer and Terminer, in and for the county of Lancaster, having been settled on the 18th of May, 1824, by the auditor general and state treasurer, who found a balance against him of eight thousand one hundred and ninety-nine dollars and thirteen and three-quarter cents; he, on the 28th of July, 1824, entered an appeal to the Court of Common Pleas of Dauphin county, under the 11th section of the act entitled, "an act to amend and consolidate the several acts relating to the public moneys, and for other purposes," passed on the 30th of March, 1811.

On the 7th of April, 1819, a verdict passed against the defendant in the Circuit Court for two thousand eight hundred and nineteen dollars and sixty-seven cents.

[*292] *On the trial it appeared that John Passmore had been appointed prothonotary of the Supreme Court for the Lancaster district, and of the Court of Common Pleas for the county of Lancaster, and also clerk of the Orphans' Court, and courts of Quarter Sessions and Oyer and Terminer, of the

[The Commonwealth v. Clarkson, Administrator of Passmore.]

same county, on the 3d of January, 1809. He continued to hold the office of clerk of the Orphans' Court, until the 6th of February, 1816, of prothonotary of the Supreme Court and clerk of the courts of Oyer and Terminer and Quarter Sessions, until the 4th of March, 1817, and of prothonotary of the court of Common Pleas until the 10th of April, 1818.

Henry Reigart, was sheriff of Lancaster county from October, 1812, till October, 1815; and George Hambright was sheriff of the said county from October, 1815, till October, 1818.

Among the items contained in the account settled by the auditor general and state treasurer, were the following, viz.:

- “ For amount of fees collected for Henry Reigart,
former sheriff of Lancaster county, \$1,967.87
- “ For fees collected for George Hambright, late
sheriff of Lancaster county, \$2,201.34”

These fees were received by John Passmore, in the course of his business, and during his continuance in office, for sheriffs Reigart and Hambright. During their continuance in office they had also received fees for Mr. Passmore. A considerable time after Mr. Passmore had gone out of office, he settled with these gentlemen, and then, and not until then, they respectively agreed, that these sums should be credited in their accounts against them. It appeared from Mr. Passmore's return to the auditor general, which was read in evidence on the trial by the counsel for the commonwealth, that he had repeatedly urged settlements at an earlier period with Mr. Reigart and Mr. Hambright, but could not accomplish his purpose on account of their embarrassments.

The question for the decision of the court was whether the two sums above stated were taxable? The decision of the Circuit Court being against the defendant, he entered his appeal, because the judge instructed the jury that the plaintiff was entitled to a verdict for one-half of the amount of those sums, when he ought to have instructed them that they were not liable to taxation.

Buchanan, for the appellant.—The construction of the act of the 10th of March, 1810, *Purd. Dig.* 608, being that those fees only are taxable which were received by the officer during his continuance in office, as determined in *Heister v. The Commonwealth*, the question on which the decision of this cause depends, is, whether the appropriation of money received by the prothonotary for the sheriff, to fees received by the sheriff for the pro-

[The Commonwealth v. Clarkson, Administrator of Passmore.]

[*293] thonotary, be *a receipt of the fees by the prothonotary, at the time he received the money of the sheriff, or at the time the appropriation is actually made? He argued in support of the negative of the proposition, and cited *Turner v. Fendall*, 1 Cranch, 117; 6 Bac. Ab. 135.

Douglass, for the commonwealth, answered—That the fees were substantially received while the prothonotary was in office, because, the right of set-off then existed, which was equivalent to actual payment.

The opinion of the court was delivered by

GIBSON, C. J.—Mr. Passmore, while in office, received fees which were due to the sheriff, and the sheriff during the same period, received fees which were due to Mr. Passmore; and the question is, whether these cross demands extinguished each other by operation of law, or whether that effect was produced for the first time when actual defalcation took place by the act of the parties?

Defalcation was unknown at the common law, according to which, mutual debts were distinct and inextinguishable except by actual payment or release. But the statute of set-off which was intended to prevent circuity, has been held to operate on the rights of the parties before action brought, or an act done by either of them. In *Murray v. Williamson*, (3 Binn. 135,) a set-off was sustained against an administrator, "because," as Judge Yeates well observed, "the sum really due at the death of the party is the true debt." On no other principle could there be a set-off against the representative of an insolvent decedent; instead of which the defendant would have to pay the demand against him first, and then come in with the other creditors for a dividend of his own money according to the degree of his debt. This we see is not the case, everything but the balance having been previously extinguished. We have other instances of the same principle, where it did not depend on positive law. In *Griffith v. Chew*, (8 Serg. & Rawle, 17,) where the obligee in a joint and several bond, had appointed an administrator of one of the obligors, having assets, to be one of his own executors, it was held that the debt was paid presently, the law having made the application without waiting for the act of the party. On the same principle a retainer, which was formerly pleaded specially, may now be given in evidence on *plene administravit*, the law having administered the assets in the hands of the executor by payment of his debt. The application of this principle is consistent with both justice and convenience, particularly where the party to whose use the money

[The Commonwealth v. Clarkson, Administrator of Passmore.]

was received, had no property specifically in the coin or bills of which it consisted, and to whom a recovery could not be more beneficial than a retainer of the money already in hand. According to both reason and authority, therefore, the fees received by the sheriff were virtually in the hands of Mr. Passmore, the instant that he and the sheriff became *reciprocally holders of each other's funds; and, as this [*294] occurred while Mr. Passmore was in office, the fees in question are subject to taxation.

Judgment affirmed.

Cited by Counsel, 2 R. 322; 4 R. 365; 3 Wh. 278; 5 Wh. 264; 8 W. 262; 9 W. 180; 2 S. 523; 2 G. 78.

Cited by the Court, 8 W. 43; 10 W. 256.

Commented on and explained, 8 W. 411.

[LANCASTER, JUNE 1, 1829.]

Otty and Wife *against* Ferguson, Executor of Shuey, and Others.

APPEAL.

Where several legacies are charged upon land, which is sold under a judgment obtained by one of the legatees, but proves insufficient to pay all the legacies, the legatee who instituted the first suit, and obtained the first judgment and execution, gains no preference thereby; but the proceeds must be distributed *pro rata* among all the legatees.

APPEAL from the Court of Common Pleas of *Dauphin* county, under the act of assembly of the 16th of April, 1827, "relative to the distribution of money arising from sheriffs' and coroners' sales, &c." (Pamp. L. p. 471).

From the record, the substance of the case appeared to be thus: Shuey, the testator, gave legacies to sundry legatees, among the rest to Otty and wife, the appellants, all charged upon a tract of land. Otty and wife, to enforce payment of their legacy, having brought a suit against the executor, and obtained a judgment and sundry executions, procured the land to be sold by the sheriff; but as the money, when brought into court, was not enough to pay all the legacies, Otty and wife claimed a preference and to have satisfaction in full of their judgment. The other legatees insisted upon a *pro rata* dividend among all. It appeared that an issue was directed or agreed upon to try the matter in dispute, and a verdict and judgment given against the preference asked for by Otty and wife. But they claimed interest on their dividend, alleging interest to be

[Otty and Wife v. Ferguson, Executor of Shuey, and others.]

a legal consequence of the judgment in their favour. It was denied by the court below, and thereupon this appeal was taken.

Elder, for the appellants.

G. Fisher, who was to have argued for the appellees, was stopped by the court.

TOD, J.—I take the decision to be right. Very pernicious would be a rule requiring each of nine legatees, as in this case, to bring a separate action; and, though there might have been no dispute in the matter, and it was the interest of all to have a judicial sale of the land, yet to compel them to load the estate [*295] with the costs of nine actions *instead of one. The chancery practice requires no such thing, nor does our law in analogous cases. Where a fund is legally appropriated for the satisfaction of divers co-existing fixed claims, the general rule is, that no advantage is acquired, either as to principal or interest, by priority of suit.

To obtain a judgment against the estate of a person deceased, gives no preference. Nor does a levy on land. *Wootering v. Stewart's Executors*, 2 Yeates, 483; *Prevost v. Nicholls*, 4 Yeates, 479; *Scott v. Ramsay*, 1 Binn. 221. In *Dowley and Thomas v. Hays*, decided by this court in Sunbury, and not yet reported, it was held, that in case of a mortgage given to secure the payment of sundry bonds, and those bonds assigned to different holders, priority of suit or of judgment secures no advantage as against the mortgaged property. As to the rule in equity for equal payment in these cases, see 2 Har. Ch. 99; 3 Atk. 557; 1 Ves. 215; 2 P. Wms. 50; 2 Johns. Rep. 576; 1 Hen. & Munf. 11.

It is the opinion of the court that the judgment be affirmed.
Judgment affirmed.

Cited by Counsel, 1 Penn. R. 329; 3 Penn. R. 384; 1 W. & S. 145.
Cited by the Court, 1 W. 418.

[LANCASTER, JUNE 1, 1829.]

The Bank of Pennsylvania, for the use of Echelman and Another, *against* Winger and Another, with notice, &c.

IN ERROR.

The possession of money by the sheriff arising from the sale of lands, sufficient to satisfy a judgment earlier than that under which the sale was made, is not *per se*, a satisfaction of such earlier judgment. The prior judgment creditor may waive his priority in favour of a subsequent one, without working an extinguishment of his judgment, which may be satisfied out of any other land originally bound by it. And, if the subsequent judgment creditor become the assignee of the first judgment, he succeeds to all the rights of the assignor.

THIS case came before the court on a writ of error to the Court of Common Pleas of Lancaster county, in which it was a *scire facias* upon a judgment issued by the plaintiffs in error, The Bank of Pennsylvania, for the use of Jacob Echelman and Benjamin Vernor, *against* Jacob Winger and Peter Reidebaugh, with notice to Catherine and Elizabeth Stoolfoos.

As it appeared from the record, the case was thus:—Jacob Echelman, on the 9th of April, 1822, obtained a judgment against Peter Reidebaugh, one of the present defendants, for seven thousand eight hundred and fifty dollars. Upon this judgment he issued a *fiery facias* to April Term, 1822, under which the defendant's real estate was levied upon, which, by virtue of a *renditioni exponas*, returnable to August Term, 1822, was sold on the 28th of *June, 1823, for eight thousand five hundred and five dollars. The conditions of sale stated, [*296] that the property was to be sold for lawful money of the United States, to be paid on or before the 16th of August, 1823, and that the sheriff would execute a deed at the next August court, conveying to the purchaser all the estate of Reidebaugh in the premises. The purchaser executed a bond for the purchase-money, to which Echelman was a witness. Of the proceeds of the sale, Echelman received eight thousand two hundred and thirty-three dollars and seventy-eight cents, and the residue went to satisfy three small judgments of an earlier date. At January Term, 1822, a judgment was entered in favour of Benjamin Vernor against Peter Reidebaugh, conditioned for the payment of two thousand six hundred and fifty-one dollars. Prior to the judgment under which the sale took place, viz., on the 27th of November, 1820, the Bank of Pennsylvania had obtained a judgment against Jacob Winger and Peter Reidebaugh. It appeared in evidence that Reidebaugh had indorsed notes for Winger,

[The Bank of Pennsylvania, for the use of Echelman and another, v. Winger and another, with notice, &c.]

which were discounted by the Bank of Pennsylvania and the Farmers' Bank. To indemnify him against these indorsements, and also to secure payment for a quantity of grain, Winger gave to Reidebaugh a bond for eight hundred dollars, upon which judgment was entered on the 28th of December, 1819. This judgment was marked satisfied on the 26th of February, 1820, the amount having been paid by the assignees of Winger, who had made an assignment for the benefit of his creditors, and whose property yielded more than enough to pay his debts.

On the 29th of August, 1823, the Bank of Pennsylvania assigned their judgment against Jacob Winger and Peter Reidebaugh, to Jacob Echelman and Benjamin Vernor, who issued a *scire facias* to revive it, returnable to November Term, 1823, with notice to Catherine and Elizabeth Stoolfoos. Judgment in the *scire facias* having been obtained, a *fiery facias* on which the real debt was marked three hundred and eleven dollars, issued to January Term, 1824, from the return of which it appeared, that the debt, interest, and costs, had been paid by the assignees of Jacob Winger, under his voluntary assignment, made for the benefit of his creditors.

On the 1st of May, 1824, on motion of the counsel of Winger's assignees and affidavit filed, the court granted a rule to show cause why the money paid into the hands of the sheriff, on the execution in this case, should not be repaid to the assignees, the execution set aside, the judgment opened and the defendants let into a defence. After argument, the court decided, that the defendants should be let into a defence; that the execution should remain as a security, and that the money paid under it should remain in court to abide the event of the suit. The cause was tried on the plea of payment, to ascertain whether anything was due on the original judgment.

[*297] *On the trial, the court below were requested by the counsel both of the plaintiffs and the defendants, to instruct the jury on certain points, which they respectfully submitted, and to file their charge of record. In order to understand the case, it will be necessary that these points, together with the charge of the court, and the errors assigned in it, should be fully set out.

The plaintiff's points were as follows, viz. :

"1st. That a payment to a sheriff on an execution in his hands, is a payment to the plaintiff in the same, and the persons paying the money to the sheriff never can recover the same back in any form of action, and therefore the defendants in this case have no right to a return of the money paid.

"2d. That Henry D. Oberholtzer, Henry Carpenter, and

[The Bank of Pennsylvania, for the use of Echelman and another, v. Winger and another, with notice, &c.]

Christian Winger, being the assignees of Jacob Winger, who was the principal in the note on which this suit was brought, and the estate of the said Jacob Winger, in the hands of the said assignees, being sufficient to pay all his debts and considerably more, and the estate of the said Peter Reidebaugh, the other defendant, surety or indorser being insufficient for that purpose; having paid off this execution, which in equity and good conscience, they ought to have done, have no right to a return of the money so paid, and the verdict must therefore be for the plaintiffs.

"3d. That the money being made and paid, as appears by the return of the sheriff, was so paid under a full knowledge of all the circumstances of the case, and with ample means for obtaining such knowledge, on an execution issued on a judgment of a court of competent jurisdiction, and therefore cannot be recovered back again in any form of action, nor cannot be refunded to the person paying the same, and therefore the plaintiff is entitled to recover.

"4th. That although the amount of the sales of the real property of Peter Reidebaugh, who was the indorser for Jacob Winger, may have been sufficient to pay the judgment in this case, yet the plaintiff or his assignee had his option to pursue the estate of Jacob Winger, the principal, if he saw fit so to do, for the payment, and was not bound to take his money from or out of the sales of the property of the indorser, the principal having sufficient funds to pay; and the defendant, Jacob Winger, or rather his assignees, having, in consideration of there being sufficient funds, paid the amount of the execution and costs to the sheriff, did no more than in justice and equity they ought to have done; therefore they have no right to have the money refunded to him or them, and the verdict must be for the plaintiffs.

"5th. That if the assignees had, previously to paying the debt and costs on this execution, paid the amount of the note on which this judgment was obtained, to Peter Reidebaugh, the indorser, trusting to his honour to discharge the same, such payment was in fraud of the creditors and in their own wrong, and could not raise any *equity in their favour, nor could it be permitted legally to operate as an injury to the subsequent judgment and mortgage creditors of the said Peter Reidebaugh. [*298]

"6th. That if the equity is equal, the law will not interfere between the parties, but to permit them to remain in the same situation they now are in."

The following were the defendants' points :

[The Bank of Pennsylvania, for the use of Echelman and another, v. Winger and another, with notice, &c.]

"1st. That under the laws of Pennsylvania, the original judgment on which this *scire facias* issued, was on the 28th of June, 1823, satisfied and extinguished; the sheriff on that day, having sold the real estate of Peter Reidebaugh, one of the defendants in this suit, for eight thousand five hundred and five dollars, a sum more than sufficient to pay that judgment and all prior incumbrances.

"2d. That as Jacob Echelman was a witness to the single bill for eight thousand five hundred and five dollars, executed by the purchaser of Peter Reidebaugh's real estate, sold at sheriff's sale, he had full legal notice, when, on the 29th of August, 1823, he and B. Vernor, took an assignment of the judgment from the bank, that by the law of Pennsylvania it was paid and extinguished.

"3d. That if the jury believe the testimony of Peter O. Donnel, it would be against equity and good conscience to find a verdict for the plaintiffs in this case."

CHARGE OF THE COURT.—"In this case, the Bank of Pennsylvania, on the 27th day of November, 1820, obtained a judgment against Jacob Winger and Peter Reidebaugh. This judgment was afterwards assigned to Jacob Echelman and Benjamin Vernor on the 29th of August, 1823.

"Jacob Echelman, on the 9th of April, 1822, obtained a judgment against Peter Reidebaugh, one of the defendants in the suit of the bank, for seven thousand eight hundred and fifty dollars. On this judgment a *fiery facias* issued, under which the real estate of Peter Reidebaugh was levied upon and condemned. A *venditioni exponas* issued. The conditions of the sale which took place upon this *venditioni exponas*, stated that the premises were to be sold for lawful money of the United States, to be paid at or upon the 16th of August, 1823, and the sheriff would execute a deed at the next August court, conveying all the estate, right, and title of Peter Reidebaugh, consisting of his right, title, and interest of, in and to a certain tract of land containing one hundred and three acres, (more or less,) situate in Leacock township, adjoining lands of William Brinton, Jacob Musser, and others, with the improvements thereon erected. It was struck off on the 28th of June, 1823, to Jacob Musser for the sum of eight thousand five hundred and five dollars, which was paid by the purchaser. Mr. Echelman was a witness to the [*299] bond given for the purchase-money,* and this is evidence of notice to him of the state of the case. The judgment of the Bank of Pennsylvania being first in point of priority was entitled to be paid out of this money, and the sheriff having received the amount of this purchase-money, and being bound to

[The Bank of Pennsylvania, for the use of Echleman and another, v. Winger and another, with notice, &c.]

pay the liens according to their priority, the defendants contend that the judgment of the Bank of Pennsylvania was thereby satisfied and extinguished. Jacob Echelman and Benjamin Vernon, notwithstanding these proceedings, obtained from the bank on the 29th of August, 1823, an assignment of their judgment against Winger and Reidebaugh, issued a *scire facias* on it with notice to Catherine and Elizabeth Stoolfoos, obtained a judgment and issued a *fieri facias* to January Term, 1824, for the sum of three hundred and eleven dollars, with interest from 24th of November, 1823.

"On this execution there is an indorsement, 'that the debt, interest, and costs, were paid by Oberholtzer and Winger, who were the assignees of Jacob Winger, under a voluntary assignment, made by him for the benefit of his creditors.'

"Now the allegation of the defendants is, that the judgment of the bank having been satisfied and extinguished by the sale of Reidebaugh's property and the payment of the proceeds into the hands of the sheriff, all the subsequent proceedings on that judgment were irregular and void, and the money paid on the execution was forced from the assignees; that it was paid to them in their own wrong, and the plaintiffs not being entitled to receive it it should be returned to them; and these are the questions for you to try and determine under the testimony in this cause. Other matters than I have mentioned, have been given in evidence, which the parties judge material, and which it will be proper for you to consider and determine.

"The record shows that Peter Reidebaugh, on the 28th of December, 1819, obtained a judgment against Peter Winger for eight hundred dollars: this judgment was marked satisfied on the 26th of February, 1820. It appears in evidence that the bond on which this judgment was entered, was given by Winger to Reidebaugh, for some grain, and to indemnify him from the notes due the Pennsylvania Bank and the Farmers' Bank, and that the amount was paid off by the assignees of Jacob Winger, who, it seems, had in their hands more than sufficient to pay all his debts. If Reidebaugh, when he received the money, had appropriated it as he ought to have done, there would have been no question in the case, and we would have been saved the trouble of this trial; but he did not pay it, and retained the money.

"On this point of the case the defendants contend, that if you believe the testimony of Peter O. Donnel, it would be against equity and conscience to find a verdict for the plaintiff. And, on the part of the plaintiffs, that if the assignees had, previously,

[The Bank of Pennsylvania, for the use of Echleman and another, v. Winger and another, with notice, &c.]

[*300] to paying the debt *and costs on this execution, paid the amount on the note on which judgment was obtained to Peter Reidebaugh, the indorser, trusting to his honesty to discharge the same, such payment was in fraud of the creditors and in their own wrong, and could not raise any equity in their favour, nor could it be permitted legally to operate as an injury to the subsequent judgment and mortgage creditors of the said Peter Reidebaugh.

“It appears to me that quite as much stress as was necessary was laid upon this payment on both sides as it respects the question before the court. It was an unfortunate payment on the part of the assignees, and it does not appear to me how it can have much operation either against them or in favour of the plaintiffs, who were not privy to it, nor had any concern in it. If the question were made as it affects Reidebaugh, it would have great weight. If he were resisting payment it would be a complete answer. It would then manifestly show he was no longer to be considered in the light of a surety. If no injury were done to others, equity would be clearly in favour of permitting the money to come out of Reidebaugh’s estate.

“The case depends principally, if not altogether, upon the question how far the law considers the proceedings under the execution of Mr. Echelman as a satisfaction and extinguishment of the judgment of the bank.

“The plaintiffs contend, that although the amount of the sales of the real property of Peter Reidebaugh, who was indorser for Jacob Winger, may have been sufficient to pay the judgment in this case, yet the plaintiffs or their assignees had their option to pursue the estate of Jacob Winger, the principal, if they saw fit to do so for payment, and were not bound to take their money out of the sales of the property of the indorser, the principal having sufficient funds to pay, and the defendant, Jacob Winger, or rather his assignees, having, in consideration of there being sufficient funds, paid the amount of the execution and costs to the sheriff, did no more than in justice and equity they ought to have done, and therefore they have no right to have the money refunded to them, and your verdict must be for the plaintiffs.

“It appears to the court, that the plaintiffs had no such option as is contended for, and that they were bound to take the money made upon the execution if they were entitled to it, of which there can be no doubt; and it is the opinion of the court, that under the laws of Pennsylvania, the original judgment on which the *scire facias* issued, was, on the payment of the money to the sheriff on the execution against

[The Bank of Pennsylvania, for the use of Echelman and another, v. Winger and another, with notice, &c.]

Reidebaugh, satisfied and extinguished, the sheriff having received a sum more than sufficient to pay that judgment and all prior incumbrances.

"The counsel for the plaintiff have requested the court to instruct you as in Nos. 1, 2, and 3. The money being paid into court on an *execution, and waiting the decision of the court and jury, none of the parties are precluded from [*301] any remedy which they before had. The rules relative to voluntary payment do not apply. The matter is open to all the law and equity of the case, and the payment neither lessens or enlarges the rights of the plaintiffs or defendants.

"You will consider the evidence and arguments in the case, and render such verdict as you think right. If you are of opinion that the evidence shows an extinguishment of the judgment, you will find for the defendants, otherwise you will find for the plaintiffs."

The errors assigned in this court were,

"1st. The court charged the jury on the fourth point submitted by the plaintiff as follows, to wit: 'It appears to the court that the plaintiffs had no such option as contended for, and that they were bound to take the money made upon the execution, if they were entitled to it, of which there can be no doubt; and, it is the opinion of the court that under the law of Pennsylvania, the original judgment on which this *seire facias* issued, was, on the payment of the money to the sheriff on the execution against Reidebaugh, satisfied, and extinguished; the sheriff having a sum more than sufficient to pay that judgment and all prior incumbrances:' in the whole of which there is error.

"2d. The court charged the jury on the fifth point of the plaintiffs, and third and last of the defendants: 'It appears to me that quite as much stress as was necessary was laid upon this payment on both sides, as it respects the question before the court. It was an unfortunate payment on the part of the assignees, and it does not appear to me how it can have much operation, either against them or in favour of the plaintiffs, who were not privy to it, or had any concern in it. If the question were made as it might affect Reidebaugh, it would have great weight; if he was resisting payment, it would be a complete answer. It would manifestly show he was no longer to be considered in the light of security, if no injury was done to others. Equity would be clearly in favour of permitting the money to come out of Reidebaugh's estate.' In this there is error, and it is not an answer to the points, and was calculated to mislead the jury.

[*The Bank of Pennsylvania, for the use of Echelman and another, v. Winger and another, with notice, &c.*]

"3d. That the first, second, third, and sixth points submitted by the plaintiffs, are not answered by the court, although very material to the matter in controversy, and so far as they are answered there is error in the answer.

"4th. The general errors."

Evans and Norris, for the plaintiffs in error, cited 1 Johns. Ch. Rep. 410, 512; *The Commonwealth v. Miller's Administrators*, 8 Serg. & Rawle, 458; *Patterson v. Swan*, 9 Serg. & Rawle, 16; *Barnet v. Washebaugh*, 16 Serg. & Rawle, 414; [*302] **Morris v. Tarin*, 1 Dall. 147; *Same v. Same*, 2 Dall. 115; 1 Day, 130; 1 Esp. 5, 16.

W. Hopkins, for the defendants in error, cited 2 Bac. Ab. 739; *Harris v. Fortune*, 1 Binn. 125; *Moliere's Lessee v. Noe*, 4 Dall. 450; *Hunt v. Breeding*, 12 Serg. & Rawle, 41; *Cowden v. Brady*, 8 Serg. & Rawle, 508; *Whart. Dig.* 90, pl. 4; *Lighty v. Brenner*, 14 Serg. & Rawle, 132, 133; *Gilb. Law of Executions*, 25, 26; 2 Saund. 47 a, n. 1; 2 Bac. Ab. 720; *The Bank of North America v. Fitzsimons*, 3 Binn. 358; *Auwerter v. Mathiot*, 9 Serg. & Rawle, 403; 2 Johns. Ch. Rep. 443.

The opinion of the court was delivered by

GIBSON, C. J.—It was long a moot point whether the sale of land on execution would discharge a prior lien; but I believe no one ever suspected that it would discharge the debt. Such a consequence could be produced only by treating the debt and its lien as inseparable. The lien is, however, but a security which may be released either before or after a sale, and, as any other security, without affecting the existence of the debt. By a sale, the purchase-money is substituted for the land; and as it is withdrawn from the control of the debtor, and put within that of the lien creditors, I admit that they are bound to look to the application of it, insomuch that a loss of any part of it will have to be borne by him whose act occasioned it: in other words, that the debtor may, in equity and conscience, consider whatever has perished in the hands of the sheriff, as actually paid to him who is entitled to receive it. But can he do so in respect of what has gone into his own pocket, or, what is the same thing, in case of his debts? It never has been supposed—certainly it never has been decided—that he can. Where a creditor has had two funds, we have prevented him from frustrating the lien of another who had but one; yet that could not be done if the rights of the parties were fixed by the sale; for the prior judgment creditor would be paid by operation of law, and before

[The bank of Pennsylvania, for the use of Echelman and another, v. Winger and another, with notice, &c.]

the court could interpose. *Hunt v. Breeding* (12 Serg. & Rawle, 37), is cited to show that a levy to the value of the debt, is *per se*, satisfaction of the execution on which the levy was made. It would be more to the purpose to show that it discharges other executions which bind the goods. If such were the law, a multitude of cases would necessarily have arisen under it; and the total absence of decision on the subject, is satisfactory evidence that the principle does not exist. Surely a right to priority of payment may be waived without waiving that of which it is but an accident. A creditor may release the land without releasing the debt; and why not the purchase-money, which is in the place of the land? It seems to me he does no more when he waives his preference in favour of those who claim under the debtor by title subsequent. It is a principle of common sense, which has been embodied as a maxim, that any one may waive a right created for his own benefit. What injury can it do any one? *Surely Reidebaugh, whose proper [*303] debt was paid with his own money, could not object to the waiver of preference by the bank: and let us see whether Winger, his co-debtor, has any better right to do so.

Winger and Reidebaugh originally stood in the relation of principal and surety; so that the refusal of the bank to take satisfaction out of the land of the surety, was in furtherance of the equity between the debtors themselves; and to this Reidebaugh, the surety, could not object. But, previous to this Winger had put into his hands funds to discharge the whole debt, which Reidebaugh misapplied; and the original relation between them, therefore, was, in fact, reversed. But of this the bank was not apprized, and it was therefore justifiable in acting in conformity to the equity of the original relation. It waived its preference in favour of a surety to pursue the principal—the very thing that a court of equity would have compelled it to do. I will not stop to inquire whether the relation of principal and surety is dissolved by a judgment at law, although the negative of the question is sustained by a solemn decision of this court, and there can be no reason why the fixing of the parties at law should absolve the principal from the moral obligation to protect his surety. For the purposes of the argument I will admit that the relation is extinguished. The consequence is that both are principals, and stand in equal equity as between themselves. How then could Winger object to the waiver of its preference by the bank, if Reidebaugh could not? A creditor may collect his debt from either of two principal debtors, or from both, at his election. If then the sale by the sheriff were not payment *per se*, the bank had nothing in its hands but the

[The Bank of Pennsylvania, for the use of Echelman and another, *v.* Winger and another, with notice, &c.]

means of actual payment, which it is not bound to retain in favour of any one but a surety. This principle is well settled both in Pennsylvania and England. *The Commonwealth v. Miller's Administrators* (8 Serg. & Rawle, 457); *Reed v. Garvin* (12 Serg. & Rawle, 103). The bank then might well permit the proceeds of Reidebaugh's land to go to his use without injury to Winger, who was in no aspect entitled to be treated as a surety, and who had no other right to object than that of Reidebaugh himself.

Thus far I have considered the question as if it were between the defendants and the bank. The judgment is, however, owned, in part, by Echelman, the plaintiff in the judgment on which Reidebaugh's land was sold; and the question is whether he did not stand in, at least, as favourable a situation as did the bank. The case is just this: the bank had a judgment against two, which was brought in by a younger judgment creditor, to enable him to give a preference to his judgment against one of them. I can see nothing wrong in that. An assignee for valuable consideration, succeeds to all the rights of the assignor. Even an assignee, with notice, succeeds to the rights of a purchaser without it, because, having paid for the advantage arising from the [*304] ignorance of the assignor, he is entitled *to the benefit of it. If then the bank might have used its judgment, so as to favour Echelman, he acquired the same capacity; for when distinct rights concur in the same person, they are to be treated as if they existed separately in different persons. So far was it from being unconscionable in him to possess himself of the means and capacity of the bank, that a court of equity would have given him the benefit of them. "If," says Chancellor Kent, "a creditor has a lien on two parcels of land, and another creditor has a lien, of a younger date, on one of these parcels only, and the prior creditor elects to take his whole demand out of the land on which the junior creditor has a lien, the latter will be entitled either to have the prior creditors thrown upon the other fund, or to have the prior lien assigned to him, and to receive all the aid it can afford. (*Cheesborough v. Millard*, 1 Johns. Ch. 412.) I cite this case because it contains a principle, in every particular, applicable to the case before us, and also references to the authorities. Echelman, therefore, could have compelled the bank to exhaust its means of obtaining satisfaction from the lands of Winger, or, on payment of the debt, to assign its lien. It has voluntarily done the latter; and Echelman brings, in aid of the legal capacity of the bank, the equity of a junior judgment creditor to have that capacity exerted for his advantage. It seems to me that,

[The Bank of Pennsylvania, for the use of Echelman and another, v. Winger and another, with notice, &c.]

independent of all other considerations, this is decisive in his favour. I am therefore of opinion that the judgment be reversed.

Judgment reversed.

Cited by Counsel, 1 Penn. R. 275; 2 Penn. R. 204, 281, 477; 3 Penn. R. 59, 3 R. 295; 5 R. 55; 5 W. 230; 8 W. 269; 9 W. 540; 10 W. 10; 9 W. & S. 15, 38; 7 H. 32; 6 C. 58; 8 S. 117; 20 S. 375, 376; 11 N. 201; 2 O. 45.

Cited by the Court, 1 Penn. R. 241; 3 R. 138; 2 W. 232; 4 W. 398; 8 W. 331; 4 Barr, 118; 8 Barr, 270; 2 H. 274; 3 H. 229; 20 S. 376, 377; 9 N. 390.

In *Finney v. Commonwealth*, 1 P. & W. 240, it is said that two of the five judges who decided the principal case were in favour of extending its doctrine to cases where there was a junior incumbrancer whose lien bound only the second fund.

Mr. Justice PAXSON, however, in *Horning's Appeal*, 9 N. 388, admits that the equity of a subsequent lien creditor may be such as to allow him a preference over one who has passed by one fund, but at the same time decided that the facts of the case before him did not raise any such equity.

[LANCASTER, JUNE 1, 1829.]

Roop against Brubacker.

APPEAL.

It is competent to prove by the oath of arbitrators, that certain matters were not examined or acted upon by them, and that consequently, they had made a mistake in their award.

The plea of payment, with leave, &c., does not admit the truth of all the averments in the narr. or statement. It admits nothing but the execution of the instrument on which the suit is founded and what is admitted by the general issue in every action. It is a special or a general defence, as the notice given under it makes it one or the other.

Where the plaintiff removed the cause to the Circuit Court, and recovered less than one hundred dollars, and offered no evidence to prove a demand exceeding five hundred dollars, and it was apparent that under the circumstances of the case none could be offered, the court ordered the plaintiff to pay the costs.

THIS was an appeal from the decision of Tod, J., holding a Circuit Court for *Dauphin* county in April, 1829.

The cause was argued in the Supreme Court by *M'Clure* and *Elder*, for the plaintiff in error, who cited 1 Phil. Ev. 305, 306; 1 Johns. Ch. Rep. 276; 2 Johns. Ch. Rep. 260; *Williams v. *Craig*, 1 Dall. 313; *Buckley v. Ellmaker*, 13 Serg. & [*305] Rawle, 71; *Schlatter v. Etter*, 1b. 36; *Roth v. Miller*, 15 Serg. & Rawle, 100.

Douglass, for the defendant in error, referred to *Stewart v. Mitchell's Administrators*, 13 Serg. & Rawle, 287.

[*Roop v. Brubacker.*]

The case is sufficiently stated in the opinion of the court, which was delivered by

HUSTON, J.—John Brubacker had made his will and died several years ago, and appointed Henry Brubacker and Christian Roop his executors. In his will he had devised to Christian Roop and wife, a part of his land, already surveyed off to him by J. Jones, valued at forty-five dollars per acre: to his son Joseph, a part adjoining Roop's, and up to a certain fence, for life; and, after his death, to be sold and equally divided between his sons Henry and John, and his son-in-law, Christian Roop: and to his son John he had given the rest of his plantation lying above Joseph's part, valued at forty-five dollars per acre: to his son Henry he had given a tract of land in Ohio, to be appraised to him at a reasonable valuation, and if this tract shall amount to more than John's and Christian Roop's part, then he must pay to them at the rate of twenty-five pounds yearly, to make all equal: if his amounts to less than their parts, they are to pay to him, to make all equal.

After some time, the executors having settled their accounts, and exceptions being taken to them, Joseph having died, and the part devised to him sold by the executors and purchased by Henry, and nothing yet done as to valuing the Ohio land, the parties agreed to refer to three men, to adjust and settle all matters in difference between the parties respecting the estate of John Brubacker, deceased, including the Ohio land, their several legacies, bequests, and shares, in the said estate, and all administration accounts, and in fact all and every matter and thing touching the said estate, with full power to make a final settlement, adjustment, and apportionment of all matters, accounts, and every matter between the parties touching the said will and settlement of the estate of John Brubacker. The award to be in writing and final between the parties, without appeal, and may be entered up in the court of Common Pleas of Dauphin county.

The arbitrators made a full and detailed report of the accounts of the executors, finding a balance from Henry to the estate of four hundred and twenty-two dollars and eighty-two cents, and a balance to Roop of forty dollars and fifty-one and a half cents. This part of the report charged Henry Brubacker with the land he had bought, eighty-nine and a half acres, at thirty dollars and twenty-five cents. There were other matters also in the report, not necessary to be mentioned here, and it then proceeded:—"That John Brubacker and Christian Roop, do take the Ohio lands at a just and reasonable valuation, to be fixed agreeably to the article of agreement entered

[Roop v. Brubacker.]

*into by and between the parties on the 2d of September, 1823: That the said John Brubacker and [*306] Christian Roop give the said Henry Brubacker a credit for one-third part of the appraised value of the Ohio land:” and also contained some other matters not necessary to be here stated.

Christian Roop brought this suit against Henry Brubacker, and it is for debt on settled account by reference. In his statement, he says he claims a debt due him by the defendant, on a settlement made between them by the referees, (naming them,) and proceeds to set out the submission and award at full length, and then avers there is due to him one-third part of the balance found in the hands of H. Brubacker, being one hundred and forty-nine dollars and fifty-four cents, and also the sum of forty dollars and fifty-one cents, and some matters not necessary to be stated, and proceeds:—“and the further sum of six hundred dollars, being one-third part of the value of the Ohio land, which the plaintiff and John Brubacker were willing and desirous to have taken at a just and reasonable valuation according to the article of agreement entered into by and between the parties, dated the 2d of September, 1823; and the said plaintiff further avers, that he has often before the bringing of this suit, requested the said Henry Brubacker to have the said Ohio lands valued according to the aforesaid article of agreement, and then to convey the same to him and the said John Brubacker, but the said Henry hath always refused;” and then he states an account of all the items of his claim, and avers them to be all due, and proceeds:—“and the said plaintiff further avers, that the said Henry Brubacker has assumed, promised, and undertaken, to pay him the said amount of nine hundred and eighty dollars and eighty-eight cents, and interest from the 9th of October, 1823.”

I shall not undertake to decide whether this is a statement under our act of assembly or a declaration; or both, or neither. The defendant made no objection to it and makes none now. To this the defendant pleaded payment, with leave to give the special matter in evidence, and gave notice in writing of all the matters which he offered in evidence, and particularly of the deficiency in the quantity of land sold to Henry.

On the trial the jury found for the plaintiff ninety-two dollars and thirty cents, leaving the Ohio lands out of the consideration of the jury.

There was a motion for a new trial which was overruled, and an appeal to this court. The principal reasons relied on were, that the court permitted evidence to show that Henry Bru-

[*Roop v. Brubacker.*]

backer, who was charged with eighty-nine acres and a half of land at thirty dollars and twenty-five cents per acre, actually got about ten acres less land, and permitted the arbitrators to prove that they did not measure the land or consider the quantity in dispute before them; that all parties before them assumed that to be the quantity; that nothing was said about it, and they calculated, as the award showed, on that basis; and one of the [*307] *arbitrators proved, that since the award, he had resurveyed the land, and that the real quantity was seventy-nine acres and some perches.

This point was argued as if the judge had admitted testimony to contradict and set aside the award, and received this testimony by the oath of the arbitrators. To put the sanctity of an award on the highest ground ever assumed, it is no greater than a judgment of a court; but a judgment is not conclusive of any matter not in contest and not decided on. And in this case all that was admitted was that the quantity of land in the part sold to Henry Brubacker, was not in question, not disputed, and not considered as in dispute, and of course, not decided on by the arbitrators. It was then open to proof in this case, and one of the arbitrators who re-surveyed it, was as competent a witness as any other man, to prove the real quantity. The arbitrators may be examined to prove whether a matter was acted on by them, or to prove a mistake made by them, 2 Johns. Ch. Rep. 276.

The next objection was to the Ohio lands. The plaintiff relied on a right to recover as to them, because he had set out the award correctly, viz.: "That John Brubacker and Jacob Roop do take the Ohio land at a just and reasonable valuation, to be fixed agreeably to the articles of agreement entered into between the parties, dated the 2d of September, 1823: That the said John Brubacker and Christian Roop, give the said Henry a credit for the one-third part of the appraised value of the Ohio land," and had averred in the said narr. or statement, "that he believes there is justly due to him by the defendant, the further sum of six hundred dollars, being the one-third part of the value of the Ohio lands which the plaintiff and John Brubacker were willing and desirous to have taken at a just and reasonable valuation, according to the article between the said parties, dated the 2d of September, 1823; and the plaintiff avers, that he has often requested the defendant to have the said land valued according to the said article of agreement, and then to convey to the plaintiff and John Brubacker, but the said Henry has always refused." As the defendant had pleaded payment, with leave, &c., the plaintiff contended this admitted the truth of every averment in the declaration. If this were true, it would not

[Roop v. Brubacker.]

avail him, for he has only averred that he believes the Ohio lands are of such value as that his one-third is worth six hundred dollars; and nobody ever before supposed an averment of damages for breach of covenant or promise was anything on which a jury could act. No testimony was given or offered respecting those lands. They were not mentioned by any witness and no document, except the will and award was before the court in which they were even named. I do not rely on the defect of the averment, which omits to state that the plaintiff offered to choose men to value them, and offered to give Henry the credit, &c.; but I deny totally the position that the plea of payment admits in any case any material averment, except the *execution [*308] of the paper, and except what is admitted by the general issue in every action, viz.: that the plaintiff and defendant are the parties who have a right to sue, &c.

The act for defalcation, passed in 1705, gave the first legislative authority to courts of law, for exercising chancery power. It is the germ from which all the equitable power of our courts over contracts sprang; it is of daily use, and without it or a substitute for it, the justice of half our causes could not be attained. We have a thousand adjudged cases on it; these are not exactly in terms the same, principally because when brought into consideration as to a particular question, and in a particular aspect, the expression of judges then used, and which only relate to the case before them, are improperly considered as general, applicable to all cases, and intended so by the judge, a most fruitful source of loose argument, and often of something worse. As we find this fact alluded to in many cases, we often look only to the cases. The act is actually unknown, or affected to be unknown. It is a common expression, that it applies only to sealed instruments; and we have one reported case in which it is decided there can be no set-off, and that no sum can be found in favour of a defendant under this act; whereas no sum can be found in favour of a defendant except under the express provisions of this act.

It is as follows:—

“If two or more dealing together, be indebted to each other upon bonds, bills, bargains, promises, accounts, or the like, and one of them commence an action in any court in this province; if the defendant cannot gainsay the deed, bargain or assumption upon which he is sued, it shall be lawful for the defendant to plead payment of all or part of the debt or sum demanded, and give any bond, bill, receipt, account, or bargain in evidence; and if it shall appear,” &c., and after; “but if it shall appear the plaintiff is overpaid, then they shall give their verdict for

[Roop v. Brubacker.]

the defendant, and certify withal to the court how much they find the plaintiff to be indebted," &c.

The old cases go to extend the benefits of this act, and some of the modern ones are of the same description; *Steigleman v. Jeffries*, 1 Serg. & Rawle, 467, and *Heck v. Shener*, 4 Serg. & Rawle, 249. In 1 Dall. 258, McKean, C. J., in an important case, in which he tells us he delivered the unanimous opinion of the court, says the plea of payment, with leave, is made the general issue by the law of this state; and further, on the plea of payment in an action on a bond, and when the issue is joined on this plea, the jury may and ought to presume every thing to have been paid, which *ex equo et bono*, in equity and good conscience ought not to be paid; such is the current of the determinations in the Court of Chancery in England; for though courts of justice cannot alter or destroy the contract of the parties, they may interfere to render it conformable to reason, justice, and conscience. It would be tedious to go through all [309] the cases from 1 Dall. 17, that mistake or want *of consideration may be given in evidence under this plea. That the defendant "was unlettered," may be, or that a bond given for one purpose was used for another, 2 Binn. 154; that the note was given for land held under the Connecticut title; that it was given for tickets in an illegal lottery; in short, we have cases which meet every possible case of defence of every kind, which go to show the plaintiff ought not to recover. The plea is then a special defence or a general one, as the notice makes it one or the other. To be sure, it admits the execution of the instrument, or the having made a bargain, but nothing more. So entirely is this the case, that when the plaintiff declares on a bond or note, he can indeed read it without calling the subscribing witnesses or proving the handwriting, but the bond or note must be produced and read to the court, or its loss proved and the purport of it, or there can be no recovery; and this is, and has been the universal practice and uniform decision of every court of late, and only of late have we heard of matters being admitted by the plea of payment. This idea arose from considering what could be proved under that plea at common law, where its nature and meaning were totally different from the one attached to it under our act: under that act, it is a general issue, or it is absurd. The action against an indorser may be, perhaps ought to be, debt under the present law of this state. Payment, with leave, &c., would be a good plea: it is a usual one. The handwriting of the indorser need not be proved, but no court has yet been called on to decide that the plaintiff is not bound to prove demand of the maker, and refusal. Debt is the only action on a book account now. The statement, unless it is de-

[Roop v. Brubacker.]

manded, need not give the particular items, nor specify price of each article, but must give the date of the commencement and end of the account, and state a sum as the amount. I do not know that, although *non assumpsit* was the usual plea while the action was assumpsit, that it is so now it is changed to debt: payment with leave is the proper, or at least is a proper plea. I have not seen an attempt to recover without producing the book of original entries, and as the plaintiff must, on this plea, produce his bond or note, the lawyer who would direct his client to go to trial without any evidence, would not succeed. In *Schlatter v. Etter*, 13 Serg. & Rawle, 36, something on this subject will be found. The abstract of the case is not fully correct. That the plea of payment, with leave, to a statement, does not admit any fact not mentioned in the statement: if essential, the plaintiff must prove it, is true: but the case decided more than that. It was a suit for the difference between certain country notes paid by the defendant to the plaintiff, and city notes; and the statement did aver an agreement by the defendant to pay this difference, provided it did not exceed ten per cent., and he produced the defendant's agreement in writing, expressly to this effect, and he expressly averred "that the discount and difference in exchange on the above notes, amounted to two hundred and eleven dollars and eighty-four cents, being *eight [*310] per cent.; that thirty-five dollars in part had been paid by the defendant, but that one hundred and seventy-six dollars and eighty-four cents remained due," &c.; and the decision was that the plaintiff could not recover without proving that the notes paid in, were not at par, and without proving what was the actual discount. I am not aware that any possible plea would have enabled the plaintiff to obtain a verdict in this case as to the Ohio lands without some proof of their value, and also some evidence as to an attempt by the plaintiff at an offer to have them valued.

In 15 Serg. & Rawle, 105, 106, *Duncan, J.*, says, in speaking of this plea, which had been put into a bond of indemnity, "What I understand by this is, that it puts everything in issue contained in the notice of defence which protects the defendant, but it admits the execution of the deed set out, and the conditions expressed in it."

To make the most of it, a plea may admit a contract as set out, but if the suit is for damages for non-performance of that contract, the damages must be proved, or a jury give nominal damages. I am not aware that it was ever before contended that any plea admitted the averment of damages, for breach of an agreement to be as set out, unless where the amount was part of the agreement. There was then no error in this direction to the

[*Roop v. Brubacker.*]

jury, that as no evidence had been given relative to the Ohio lands or the value of them, they could not undertake to decide on their value, especially in this action on a settled account.

By the 19th section of the act of the 2d of April, 1803, no cause shall be removed from any Court of Common Pleas to the Circuit Court, unless the plaintiff's demand or the value of the controversy between the parties, shall exceed the sum of five hundred dollars; and the next section directs that the court wherein the said action shall be tried, shall have power to make the party that removed the same pay the costs of suit, if in the opinion of the said court, the action shall have been removed without a reasonable foundation of its being within the true spirit of and meaning of the aforesaid section.

The plaintiff removed this cause and recovered less than one hundred dollars, and gave no evidence or offered no evidence to prove, any demand exceeding five hundred dollars; and as further it is not apparent, how under that award, and in this suit, any such evidence could be offered, the court ordered and adjudged the plaintiff to pay the costs. In this there was no mistake. The Circuit Court sits in each county but once a year. The legislature intended its time should not be occupied by trifling demands; the law requires a certificate of the counsel who removes it, that he verily believes it is within the true spirit and meaning of the act; it cannot be permitted to evade the law by inserting in the narr. or statement, a matter which cannot be or is not intended to be tried, and thus raise the demand beyond five hundred dollars. Aware that causes might be removed without minute investigation of the amount really claimed, this penalty was intrusted to the court, and will be applied in all proper cases.

Judgment affirmed.

Cited by Counsel, 1 Wh. 64; 4 Wh. 244; 3 W. & S. 445; 5 W. & S. 264; 8 Barr, 119; 10 Barr, 57; 32 S. 147; s. c. 2 W. N. C. 87.

*[LANCASTER, JUNE 1, 1829.]

[*311]

The Commonwealth, for the use of Mishey and Others,
against Brenneman and Another, Administrators of
 Brenneman.

IN ERROR.

In an action on a recognisance entered into in partition, in which the plea is a release, and the replication, that the release was without consideration, fraudulent, and void, evidence is not admissible under the replication, to show that though the release was expressed to be for a full consideration, none was paid: and that, to induce the releasors to execute the instrument, the releasee artfully and fraudulently represented, that if they would execute it he would pay them afterwards, and that the administrators of the releasee retained in their hands money to meet the claim of the releasors.

Nor is evidence admissible to show, (where third persons are interested,) that the release was induced by the purchaser of the share of one of the heirs refusing to pay without a release from all the heirs: That they agreed to meet his wishes, upon his paying only the purchase-money of the share he had bought: That there was an understanding among the heirs, that the release was to operate only in favour of the purchaser; and that among themselves, though absolute in form, it was to remain inoperative until those who took the land at the appraisement, paid to each of the heirs the share of the valuation money.

On a general allegation of misrepresentation and fraud, a party may be compelled to specify the evidence on which he relies to establish fraud.

ON the return of a writ of error to the District Court for the city and county of *Lancaster*, it appeared from the three bills of exceptions which came up with the record, that this was an action of debt on a recognisance, brought in the name of the Commonwealth, for the use of Jacob Mishey, Samuel Basler, Michael Brenneman, Jr., and Thomas Eagar, assignees of Christian Longenecher, Jr., administrator of Feronica Longenecher, deceased, late wife of said Christian, and who was a daughter of Henry Brennemann, deceased, against John Brenneman and John Jack, administrators of Henry Brenneman, the younger, deceased, with notice to Elizabeth Brenneman, widow of the said Henry Brennemann, the younger, and John Brenneman, terre-tenants.

The defendants pleaded "a release and payment," &c., to which the plaintiffs replied, "release without consideration, fraudulent, and void, *non solverunt* and issue."

On the trial, after the plaintiffs had given in evidence the record of an inquisition in partition, the recognisance entered into by Henry Brennemann, the younger, and others, and other evidence necessary to make out their case, the defendants ex-

[The Commonwealth, for the use of Mishey and others, v. Brenneman and another, Administrators of Brenneman.]

amined John Brandt, who, after having proved the execution of the release, to which he was a subscribing witness, testified as follows:—"It (the release,) was done at Jacob Barr's house, in Maytown; Abraham Shock had purchased the land of old [312] Brenneman's son, Jacob, *the share which he took, and he paid five or six thousand dollars on the table, to the parties to the release. It was paid on the lump, and they were to divide it as they pleased. Christian Longenecher got some money. Do not know that Henry Brenneman paid any money for his share. Shock would not pay any money till all released. I don't know that Henry Brenneman paid any money at that time—not a dollar paid at that time, except what Abraham Shock paid." The defendants then gave in evidence a release from Christian Longenecher and wife to Henry Brenneman, the younger, dated the first of April, 1819, when the plaintiffs made the following offer of evidence:—"The plaintiffs, in support of their replication to the plea of a release, that it was without consideration, fraudulent, and void, offer to prove, in addition to the testimony and evidence already given, that the release was procured by Henry Brenneman, to be drawn before the time of execution, as executed for full consideration, when he had not the consideration money to pay: That to induce Christian Longenecher and wife to execute the release, he artfully, and fraudulently represented, that they should execute the release without receiving the purchase-money; that he would pay them the money afterwards, and that they might rely on his doing so if they would release: That they, Christian Longenecher and wife, relying on the assurances so given, executed the release, without receiving any consideration therefor: That not a cent of the consideration of the said release was ever paid: That Henry Brenneman died in July, 1822: That notice was given to his administrators of this claim, and that they have retained the amount of this claim, and now have it in their hands; and that on the same day, and immediately after the execution of the release by them, Henry Brenneman told Christian Longenecher, that he had some claim against the wife, and that he should come to his house shortly, and would settle and satisfy him, which he never did do."

The counsel for the defendants having objected to the evidence thus offered, the court sustained their objection, and sealed the first bill of exceptions.

After the evidence, offered as above, had been rejected, the plaintiffs offered to prove, "That the release given in evidence by the defendants, was induced by the purchaser of Jacob's share refusing to pay without a release being executed by all

[The Commonwealth, for the use of Mishey and others, v. Brenneman and another, Administrators of Brenneman.]

the heirs, and that the heirs of Henry Brenneman, the elder, agreed to meet the wishes of the purchaser, by executing the release upon his paying the purchase-money of the share he had bought, which was assigned to Jacob, under a full understanding amongst themselves, that it was to operate in favour of the purchaser only; and that, as amongst themselves, as the heirs who had taken land at the appraisement, were not then prepared to pay the purparts belonging to the other heirs, the release, though in form absolute, was to be, and *remain inoperative, until the persons taking the lands, paid to each [*313] of the heirs, their share in the valuation money: That under this understanding, mutually entertained and agreed to by all the heirs, the release was executed, upon the payment of the money by Mr. Schoek only: That Henry Brenneman, the son, did not pay anything to any of the heirs, on executing the release, but agreed to do so, notwithstanding the release, at a subsequent time: That payments were made by Henry Brenneman, in his life time, to all the heirs but Christian Longenecher and Feronica, his wife, to whom not a cent has ever been paid of her share in the land taken by her brother, Henry Brenneman." The defendants objected to the evidence offered, and the court would not permit it to be given; upon which the second bill of exceptions was tendered by the plaintiffs' counsel and sealed by the court.

From the third bill of exceptions, it appeared, that the plaintiffs having produced a witness, the defendants' counsel called upon them to state in writing the evidence intended to be given; and the court having sustained the requisition, the plaintiffs' counsel offered to prove, "That at the time of the execution of the release, given in evidence by the defendants, no part of the consideration money (being the share coming to Feronica, the wife of Christian Longenecher, on the valuation), was paid by her brother, Henry Brenneman; but that the said Christian Longenecher, and Feronica, his wife, were induced by the said Henry Brenneman, to execute the said deed, without receiving the consideration money, by the fraud and contrivance of the said Henry, artfully and falsely imposed upon them, by false representations made to them on the day, and at the time of the execution of the said deed by them, which inspired them with a confidence in his representations, that was betrayed; and that the said Henry Brenneman, who took the land at the appraisement, died in July, 1822." The counsel for the defendants objected to this offer, and the admission of evidence under it, as not containing a statement of any facts, acts, or conversations intended to be given in evidence, but merely a general allegation, that fraud,

[The Commonwealth, for the use of Mishey and others, v. Brenneman and another, Administrators of Brenneman.]

contrivance, and falsehood, were practised by Henry Brenneman, relative to the release, and as not being a compliance with the requisition of the court, nor with the rules and practice of courts, in requiring a party, when requested by the opposite party to reduce to writing the testimony offered. It was likewise objected to, as being irrelevant to the issue; but no objection was made to proving the time of Henry Brenneman's death.

The court decided, that evidence should be received to show, that the release was obtained by mistake, fraud, or misrepresentation: That to enable the court to decide on the competency and admissibility of the evidence, the plaintiffs should, in their offer, specify the evidence by which they sought to establish these matters; which not being done, the court rejected so much [*314] of the evidence *offered, as was objected to by the defendants' counsel, and admitted the residue. To this opinion of the court the plaintiffs' counsel excepted.

On the argument in this court, *Jenkins* and *Hopkins* for the plaintiffs in error, cited 2 Bl. Com. 300; 7 John. Ch. Rep. 102; 2 John. Ch. Rep. 35; 1 Madd. Ch. 263; *Hamilton v. McGuire's Executors*, 3 Serg. & Rawle, 355; *Miller v. Henderson*, 10 Serg. & Rawle, 290; *Hain v. Kalbach*, 14 Serg. & Rawle, 159; 10 Mass. Rep. 456; *Christ v. Diffenbach*, 1 Serg. & Rawle, 464; *Broderick v. Broderick*, 1 P. Wms. 239.

Evans and *Ellmaker* for the defendants in error, cited *Wentz v. De Haven*, 1 Serg. & Rawle, 317; *Coe v. Hutton*, 1 Serg. & Rawle, 398; *Heilner v. Imbrie*, 6 Serg. & Rawle, 411; *Cozens v. Stevenson*, 5 Serg. & Rawle, 424; *Iddings v. Iddings*, 7 Serg. & Rawle, 114; 11 Mass. Rep. 347; *Wolverton v. The Commonwealth*, 7 Serg. & Rawle, 273.

The opinion of the court was delivered by

ROGERS, J.—This was an action of debt on recognisance, to which the defendants pleaded payment and release. Replication, release without consideration, fraudulent and void, *non solverunt* and issues. To maintain the replication, the plaintiffs offered to prove, "that Henry Brenneman procured the release to be drawn before the time of execution, as executed for full consideration, when he had not the consideration money to pay: That to induce Christian Longenecher and wife to execute the release, he artfully and fraudulently represented, that they should execute it without receiving the purchase-money: That he would pay them afterwards, and that they might rely upon

[The Commonwealth, for the use of Mishey and others, v. Brenneman and another, Administrators of Brenneman.]

his so doing, if they would release: That Christian Longenecher and wife, relying on the assurance so given, executed the release, without receiving one cent of consideration: That Henry Brenneman died in July, 1822, and that upon notice being given to his administrators, they have retained the amount of the claim, and now have it in their hands: That on the same day, or immediately after, Henry Brenneman told Christian Longenecher that he had some claim against his wife: That he should come to his house shortly, and would settle with and satisfy him, which he never did."

It appears that Abraham Schoek, who had purchased the share taken by Jacob, at the appraisement of the real estate of his father, Henry Brenneman, refused to pay the purchase-money, unless all the heirs would execute releases. In pursuance of this family arrangement, and to accommodate a relative, they agreed to execute them, and to substitute a promise to pay a future day. This, it is contended, supports the replication of fraud and want of consideration. Without resorting to the technical importance attached to an instrument under seal, here was a sufficient consideration to *support [*315] an action on the promise to pay. By the contract, which the parties had an undoubted right to make, one species of debt is substituted for another. In a suit on the promise, Henry Brenneman could not defend himself upon the allegation of a want of consideration. Such a transaction as this is by no means uncommon, where, by the release of an heir, you enable another to dispose of his property, which he would otherwise be unable to effect. If Christian Longenecher and wife have lost their share of the estate, it is certainly a misfortune, but one, however, of their own choosing; and I am at a loss to see any thing in the transaction, which supports the replication of fraud. The court excluded the testimony, because not supporting the issue, it could have no legal effect. The amount of the plaintiffs' offer is, to prove a non-compliance with the contract of Henry, that he would pay the amount of Christian Longenecher's wife's share, in consideration of the execution of the release, and for this the law has provided him his appropriate remedy. There is no doubt, that in the breach of promise, Henry Brenneman, in a moral point of view, was guilty of fraud; but it was no more fraudulent than any other breach of trust, or of promise. There was no false representation, or concealment of any existing fact, which constitutes the legal idea of fraud; for there is no doubt, (at least the contrary is not alleged), he religiously intended to perform his part of the contract, but was prevented by the pressure of misfortune, or some casualty,

[The Commonwealth, for the use of Mishey and others, v. Brenneman and another, Administrators of Brenneman.]

which usually occurs in cases of those who are unable to comply with their engagements. There is no pretence to say, that he used any surreptitious or undue means to obtain the release, or that he practised such acts, or made use of such false tokens or finesse, as usually lay the foundation of an action of deceit. *Boyd v. Stone*, 11 Mass. Rep. 347. If a man purchase a horse, on a promise to pay in three days, a failure to pay at the time does not annul the contract, and revest the right of property ; but the remedy is a suit for the purchase-money. Nor here, can the non-compliance of Henry Brenneman, with his part of the contract, remit the parties to their original rights, for by the release, the recognisance is extinguished. It is impossible to avoid seeing, that this is a contest among creditors. Henry Brenneman is dead, and I presume his estate insolvent ; as, otherwise, the case is not worth pursuing, for the assignees would have the same relief in a suit on a simple contract as on the recognisance ; for the debt remains, if not already paid, although the recognisance be extinguished.

In connection with the evidence contained in the first bill of exceptions, the plaintiffs further offered to prove, that the release given in evidence by the defendants, was induced by the purchaser of Jacob's share refusing to pay without a release being executed by all the heirs ; and that they agreed to meet the wishes of the purchaser, by executing the release, upon his [*316] paying the purchase-money of the share he had bought : That there was a full understanding among the heirs, that it was to operate in favour of the purchaser only ; and that, as among themselves, the release, though in form absolute, was to be, and remain inoperative, until the persons taking the land, paid to each of the heirs their share in the valuation money : That under this understanding and agreement between the heirs, the release was executed, upon the payment of the money by Mr. Schock only : That Henry Brenneman did not pay anything to any of the heirs, when the release was executed, but that payments have been made to all the heirs but Christian Longenecher and wife, to whom no part of her share has been paid.

Whether a Court of Chancery would set up this parol agreement, so as to consider the release operative against Henry Brenneman and his heirs, it is not necessary to decide. It is, however, very clear, that a chancellor would not interpose where the rights of third persons would be affected. It would be a sufficient answer to a bill for relief, that the interest of others was concerned, whether they were judgment or simple contract creditors, purchasers, or terre-tenants of the land.

[The Commonwealth, for the use of Mishey and others, v. Brenneman and another, Administrators of Brenneman.]

There is no difficulty in perceiving the object in view, in the course pursued by the plaintiffs. If they could sustain their suit on the recognisance, they would have a lien on the fund substituted for the land, and now in the hands of the administrators, and this to the exclusion of the other creditors. Equity does not favour secret agreements, at the expense of those who neither know, nor have an opportunity of knowing of their existence; and we have ever been, and I trust, ever will be, extremely cautious in giving effect to secret family arrangements, except as against the parties themselves, or those who may be cognisant of the nature of the transaction.

The next bill of exceptions raises the question, whether, on a general offer to prove misrepresentation and fraud, a party can be compelled to specify the evidence on which he relies, to establish fraud. A history of this case presents a strong argument in favour of the power of the court; and indeed, of its necessity, in preventing the waste of time in hearing testimony, which, if permitted to be given, can have no effect, but in perplexing and bewildering the jury. The plaintiffs had made two specifications of matters, which they alleged, supported the replication, and these were adjudged, and rightly, as insufficient for that purpose. They then make an offer, in as general terms as possible, by which they seek to do that indirectly, which they had been prevented from doing directly. If this can be done, by the use of general terms, which give in truth no information to the court, and which do not enable them to judge of the relevancy of the testimony, which is their exclusive province. Had the plaintiffs undertaken to set out the evidence, we are *warranted [*317] in believing it would have contained but a repetition of what had already been passed on by the court, and adjudged incompetent. It would be but a mockery of the authority of the court, to suffer its decisions to be evaded in this way. This attempt, by which counsel endeavour to take from the court their legitimate authority, and go to the jury on vague and indefinite notions of the justice or hardship of a particular case, has been often made, and as often resisted. It has been argued, that witnesses sometimes refuse, except in court, to disclose the evidence which they intend to give. This does sometimes happen, but this is so rare an occurrence, as not to deserve the importance which has been attached to it by the counsel, who concluded the argument for the plaintiffs in error. It is, however, a sufficient answer to this argument, that this does not appear to be the reason the plaintiffs refused to comply with the directions of the court. When a witness refuses to disclose his

[The Commonwealth, for the use of Mishey and others, v. Brenneman and another, Administrators of Brenneman.]

knowledge, and the refusal of a party to specify the evidence on which he relies proceeds from inability, and not design, he will then be in time to claim the benefit of an exemption from the rule, under the special circumstances of his case.

Judgment affirmed.

Cited by Counsel, 4 R. 143; 3 W. 185; 2 Barr, 183.

Cited by the Court, 6 W. 121.

[LANCASTER, JUNE 1, 1829.]

Cooke *against* Reinhart and Others.

A writ of error, and not a *certiorari*, is the proper remedy for the correction of errors in the Court of Common Pleas, in a case brought into that court on a *certiorari*, to remove the proceedings of two aldermen, or justices of the peace, under the act of 6th of April, 1802, "to enable purchasers at sheriff's or coroner's sales to obtain possession."

But after the lapse of two terms, it is too late to move to quash the *certiorari*.

In a proceeding under the act of 6th of April, 1802, to obtain possession of land purchased at sheriff's sale, if the inquest find that A. B. was the defendant whose land was sold; that he was in possession at the time, and that the purchaser gave notice to him, and to C. D. and E. F., his tenants, it is a sufficient finding of the possession of the debtor, and that those who are said to be his tenants, came into possession under him.

It is enough if the inquest find that the purchaser gave due and legal notice, without expressly finding that three months' notice was given prior to the application to the justices.

Where this court reversed the judgment of the Court of Common Pleas, who had reversed the proceedings of two justices, under the act of 6th of April, 1802, and awarded restitution of the land to the defendants, a writ of re-restitution to the complainants was awarded.

CERTIORARI to the Court of Common Pleas of Lancaster county.

This was a proceeding under the act of 6th of April, 1802, by David Cooke against George Reinhart, Henry Cassel, and Abraham Cassel, to recover possession of a tract of land, &c., in Donegal township, sold by the sheriff on an execution against Henry Cassel. *The purchaser was John Roberts, who [318] by deed bearing date 25th of August, 1821, conveyed the premises to the complainant, which was addressed to John Passmore and Samuel Dale, Esqrs., aldermen, in and for the city of Lancaster, after setting forth the sheriff's sale, &c., proceeded, "your complainant being desirous of obtaining possession of the said premises, for that purpose did, on the 7th day of September, 1821, demand and require the said Henry Cassel,

[Cooke v. Reinhart and others.]

as whose property the said premises were sold, Abraham Cassel and George Reinhart, to remove from and leave the same, and they have hitherto refused, and still do refuse to comply therewith: that three months having elapsed since the service of said notice, he makes this his complaint, that such proceedings may be taken by you as are directed by the act of assembly in such case made and provided."

Upon this complaint, the aldermen issued their precept to the sheriff, by whom a jury was summoned, and the usual proceedings took place.

The inquisition which was taken by the aldermen and jury on the 15th of December, 1821, stated that "John Roberts, on or about the 16th day of August, 1821, at the county aforesaid, purchased at sheriff's sale a certain plantation or tract of land, containing one hundred and eighty acres, be the same more or less, with a two-story brick dwelling-house, a stone Swisser barn, and other out-houses thereon erected, situated in Donegal township, adjoining lands late of Henry Share, Henry Haines, and others, which said property was sold by the sheriff at the time and place aforesaid, as the property of Henry Cassel, as fully appears to us by the deed poll executed by John Mathiot, Esq., high sheriff of the said county to the said John Roberts, and to his heirs and assigns, for the said premises, bearing date the 24th day of August, 1821, which said deed was duly acknowledged in the Court of Common Pleas for the said county, on the 25th day of August, 1821, by the said sheriff, and the deed and acknowledgment duly certified under the seal of the said court: And the jurors aforesaid do further say, that the said John Roberts, and Mary, his wife, on the 25th day of August, in the year aforesaid, by their deed, under their hands and seals, and duly acknowledged, assigned the said premises to David Cooke, his heirs and assigns: And the jurors aforesaid do further say, that Henry Cassel is the defendant as whose property the said lands and tenements were sold, and that the said Henry Cassel was in full possession of the same when the sale above-mentioned was made, when the sheriff's deed above-mentioned was executed, and when the same was acknowledged in the court aforesaid: And the jurors further do say, that the said David Cooke gave due and legal notice to the aforesaid Henry Cassel then in possession of the premises, George Reinhart and Abraham Cassel, tenants of the said Henry Cassel, that the said premises had been sold to him, and required them by the said notice, in writing, to surrender up *the possession of the said premises to the said David Cooke, the purchaser thereof as afore- [*319] said, within three months after the date of such notice; and that more than three months have transpired since the date of such

[Cooke v. Reinhart and others.]

notice, and that the said Henry Cassel, George Reinhart, and Abraham Cassel, have neglected and refused, and still do refuse to comply therewith, by surrendering up the possession of the said premises to the purchaser aforesaid; and the jurors do assess damages against the said Henry Cassel, George Reinhart, and Abraham Cassel, for the unjust detention of the said demised premises at one hundred and three dollars seventy-five cents, besides all costs of suit. Whereupon it is considered by the said justices, that possession of the said premises be delivered to the said David Cooke, and that he recover of the said Henry Cassel, George Reinhart, and Abraham Cassel, his damages aforesaid, together with his costs of suit, amounting to, &c."

The aldermen having made a record of the finding, and entered judgment in favour of the complainant for damages and costs, issued their warrant to the sheriff, by virtue of which, he delivered possession of the premises to David Cooke, the complainant.

A *certiorari*, issued on behalf of the defendants, from the Court of Common Pleas of Lancaster county, returnable to January Term, 1822, under which the aldermen returned their proceedings to that court, where the following exceptions were filed on the 13th of March, 1822:

1st. The plaintiff had no right to apply to the magistrates, to hold these proceedings, until the proper authority had set aside or confirmed the proceedings had by Samuel Carpenter, Esq., and Daniel Moore, Esq., and the jury summoned before them, relative to obtaining possession of the same premises. The complainant had appeared before them, and the said magistrates and jury had acted on the case; and because the finding of the jury and magistrates did not please the complainant, he discontinued those proceedings and commenced these before the magistrates.*

2d. The plaintiff above named was not the purchaser at sheriff's sale.

3d. The jury have not found that George Reinhart or Abraham Cassel, were in possession of the premises; nor did they come into possession under the defendant as whose property the same was sold, nor was the said Abraham Cassel in possession of the premises at all.

4th. The finding of the jury is not according to the act of assembly—but is deficient, and no judgment could be rendered thereon.

5th. No legal notice was given to the defendants to leave the premises; nor is the notice stated in the complaint to have been given conformably to the act of assembly.

* The record contained nothing more than is stated in the exception, in relation to the proceedings therein referred to.—*Reporter*.

[Cooke v. Reinhart and others.]

*6th. The finding of the jury is inconsistent with the complaint and summons, and the record inconsistent with all of them. [*320]

7th. The summons is not according to the act of assembly.

8th. The aldermen had no jurisdiction in the case.

9th. The defendants were not summoned to appear before the said aldermen and jury, and, in consequence thereof, had no opportunity of making defence.

10th. General errors—that the complaint, the summons, the inquisition and record are void, as not conformable to the express directions of the act of assembly.

The Court of Common Pleas were of opinion, that the first, third, and fifth exceptions were fatal to the proceedings, which they therefore reversed, and awarded a writ of restitution. The writ was in the following form :

“*Lancaster County, ss.*

“*The Commonwealth of Pennsylvania to the Sheriff of Lancaster County, Greeting :*

[SEAL.] “Whereas by our writ of *certiorari*, we lately commanded John Passmore and Samuel Dale, Esqrs., two of the aldermen for the city of Lancaster, in the county of Lancaster, that of certain proceedings wherein David Cooke is plaintiff, and George Reinhart, Henry Cassel, and Abraham Cassel are defendants, had before the said aldermen under the act entitled ‘an act to enable purchasers at sheriffs’ and coroners’ sales to obtain possession,’ they should have before our judges at Lancaster, at our county Court of Common Pleas, there to be held on the third Monday in the year of our Lord one thousand eight hundred and twenty-one, then next, in order that such further proceedings might be had thereon, as to right and the laws of this commonwealth ought. And whereas our judges aforesaid have, for error in the proceedings aforesaid, reversed the same, and awarded a restitution of a certain plantation or tract of land, containing one hundred and eighty acres, be the same more or less, with a two-story brick dwelling-house, a stone Swisser barn, and other out-houses thereon erected, situate in Donegal township, adjoining lands of Henry Haines and others, which, by virtue of the said proceedings you lately took from the possession of the said George Reinhart, Henry Cassel, and Abraham Cassel, and delivered over to the said David Cooke, and the costs that accrued on the said proceedings, amounting to seven dollars and fifty-three cents, being unpaid ; Therefore, we command you, that without delay you restore to Henry Cassel and

[Cooke v. Reinhart and others.]

Abraham Cassel full and ample possession of the aforesaid tract of land, with the appurtenances. And we also command you, that of the goods and chattels, lands and tenements of the said David Cooke, you cause to be made and levied the sum of seven dollars and fifty-three cents, which to the said George Reinhart, Henry Cassel, and Abraham Cassel, in our [*321] same court, was adjudged for *their costs and charges which they had been put to in and about the proceedings aforesaid. And have you that money before our judges at Lancaster, at our county Court of Common Pleas, there to be held on the third Monday in January next, to render to the said George Reinhart, Henry Cassel, and Abraham Cassel, for their costs and charges aforesaid. And have you then there this writ."

To May Term, 1827, the record was returned to the Supreme Court, where the errors assigned in the proceedings of the court below were:

1st. The court erred in deciding the first, third, and fifth exceptions to be fatal to the proceedings before the aldermen.

2d. The court erred in awarding restitution of the premises to George Reinhart, Henry Cassel, and Abraham Cassel.

3d. The writ of restitution does not pursue the judgment of the court, and is erroneous in other respects.

When the cause was called up for argument, *Porter* for the defendants, moved to quash the writ, on the ground, that a writ of error, and not a *certiorari*, was the proper remedy in a case like this.

The court ordered the question to be argued, but directed the argument upon the exceptions to proceed in the mean time.

Norris, for the plaintiff, cited *Kirk v. Eaton*, 10 Serg. & Rawle, 108; *Fitzalden v. Lee*, 2 Dall. 205; 3 Johns. Rep. 424; 13 Johns. Rep. 210; 5 Johns. Rep. 350; 10 Johns. Rep. 246; 6 Cowan, 556; 2 Salk. 493; 2 Caines' Rep. 182; 4 Hawk. 144; *Ruhlman v. The Commonwealth*, 5 Binn. 24; 4 Mass. Rep. 239, 376; 5 Mass. Rep. 406; *Ship Portland v. Lewis*, 2 Serg. & Rawle, 197; *The Commonwealth v. The Cheltenham and Willow Grove Turnpike Company*, 2 Binn. 257; 2 Bac. Ab. 473; 1 Johns. Ca. 169; *Heekert's Appeal*, 13 Serg. & Rawle, 104; *Shank v. Warfel*, 14 Serg. & Rawle, 205; *Mayes v. Jacoby*, 8 Serg. & Rawle, 526.

Porter and *Hopkins*, *contra*, cited *Clark v. Yeat*, 4 Binn. 185; *Clarke v. Patterson*, 6 Binn. 128; *Boggs v. Black*, 1 Binn. 333; *Purd. Dig.* 760; *Schuykill Navigation Company v.*

[Cooke v. Reinhart and others.]

Thoburn, 7 Serg. & Rawle, 418; 13 Johns. Rep. 158; T. Raym. 85.

The opinion of the court was delivered by

GIBSON, C. J.—Had the motion to quash been in time, it must have prevailed, for it is certain that a writ of error is the proper remedy in a case like the present. To quash, however, is not of right but by favour of the court; and a motion to that effect comes with an ill grace after the delay of two terms. Neither can we say that the record is not removed. The *certiorari* is a writ of error in respect of everything but form; and as the record is actually certified, there is enough of substance in the writ to enable us to proceed. We are, therefore, to determine the cause on the exceptions. The proceedings were quashed by the court below; 1. Because other *proceedings for the same cause had been previously prosecuted to judgment. [*322] 2. Because, as it is said, the inquest have not found that the defendants were in possession, nor that those who are said to be tenants of the debtor, had come into possession under him; and, 3. Because legal notice of the sale is not, it is said, either found by the inquest or averred in the plaint.

The rule that no intendment shall be made in favour of proceedings which are in derogation of the common law is, by our practice, restrained to the question of jurisdiction. A special and limited jurisdiction is in so many cases committed to subordinate magistrates, who are either ignorant or regardless of forms, that an application of the rule in the extent in which it is usually predicated, would be intolerably mischievous. "The settled rule of this court," says Judge Yeates, "has been, on removal of proceedings of justices of the peace in cases where their jurisdiction evidently appears on the record, to form no presumption against the accuracy of such proceedings." (*Buckmyer v Dubs*, 5 Binn. 32.) Now, as it is expressly found that Henry Cassel was the defendant whose land was sold; that he was in possession at the time; and that the purchaser gave notice to him, and to George Reinhart and Abraham Cassel, his tenants, it would require considerable *astutia* to discover that the tenants were not in possession under him. So, in respect of the remaining exceptions: The inquest having found that the purchaser gave due and legal notice, nothing less than a presumption unfavourable to the accuracy of the proceedings, would enable us to say that all the requisitions of the law have not been fulfilled. It is true, that in attempting to set out the manner and form of the notice, it is not expressly found to have been given three months previous to the application to the justices; but neither is the converse found; and as the inquest could not

[Cooke v. Reinhart and others.]

have found the notice to be due and legal, if not given in due time, the inquisition, although not so formal in this respect as an indictment, is well enough. The objection to the plaint is not founded in fact; and the other exceptions which were urged below, are without the semblance of substance. It is said, that re-restitution being of grace, no reason has been shown why we should award it here. But without it, there would be small compensation in reversing the judgment. As the purchaser was deprived of the just fruits of his execution, we are bound not only to correct the error, but to redress the injury which was the consequence of it; and there is a peculiar fitness in this, where the proceeding is *festinum remedium*, the object of which would otherwise be frustrated.

TOD, J., dissented on the point of notice.

Judgment reversed; the proceedings of the justices affirmed, and re-restitution awarded.

Cited by Counsel, 7 W. 32; 9 W. 232; 9 W. & S. 152; 1 Barr, 130; 5 Barr, 178; 7 Barr, 269; 7 Wr. 385; 25 S. 343; 4 O. 431.

Cited by the Court, 4 R. 369; 13 Wr. 370; 1 N. 32; s. c. 3 W. N. C. 181.

[*323]

*[LANCASTER, JUNE 1, 1829.]

Kalbach, for the use of Reber, *against* Fisher.

IN ERROR.

No writ of error lies to the opening of a judgment by the court below. It is a matter depending on the sound discretion of that court, who are not prevented by lapse of time, from affording relief.

FROM the record of this case, returned on a writ of error to the Court of Common Pleas of *Berks* county, it appeared, that on the 12th of April, 1820, a judgment was entered in that court on a warrant of attorney in favour of John Kalbach, for the use of Conrad Reber, against Michael Fisher, for one thousand two hundred and eighteen dollars and thirty-two cents. A *scire facias* to revive the judgment, and *quare executio non* having issued, judgment was entered thereon, by consent, on the 2d of November, 1825. On the 13th of August, 1827, a rule was granted to show cause why the original judgment and the judgment on the *scire facias* should not be opened, and the defendant let into a defence; and on the 20th of December, 1827, the rule was made absolute, the judgment to remain as a security, and the proceedings in the meantime to be stayed. The cause was tried on the 11th of August, 1828, when a verdict was rendered for the defendant. A motion for a new trial was made and

[Kalbach, for the use of Reber, v. Fisher.]

overruled, and judgment entered on the verdict for the defendant.

It was alleged in this court, that there was error in opening the original judgment after seven years had elapsed from its entry, after a *scire facias* had issued upon it, and judgment rendered on the *scire facias*.

Buchanan and *Baird*, for the plaintiff in error, insisted, that the discretion of the Court of Common Pleas, in relation to opening judgments, was not without limits; and that by analogy to the limitation of writs of error, a judgment could not be opened after the lapse of seven years.

Darling, for the defendant in error, answered, that it was a matter of mere discretion, on which a writ of error does not lie, and cited *Kellogg v. Krauser*, 14 Serg. & Rawle, 143.

ROGERS, J. (after stating the case), delivered the opinion of the court as follows:—

There are many cases in which writs of error do not lie, from the decision of Courts of Common Pleas, such as granting or refusing a new trial, opening or refusing to open a judgment, and motions of various kinds, in which parol evidence is heard, without placing it on the record. *Ordronaux v. Prady*, 6 Serg. & Rawle, 512. The power of the Court of Common Pleas, in relation to opening judgments, is most ample, and policy requires that it should be liberally used, otherwise great and manifest injustice would be *the consequence, from the great [324] variety of shapes which fraud may assume in the complicated transactions of men. It depends upon the sound discretion of the court, which must be regulated more by the particular circumstances of every case, than by any precise and known rule of law. From the constitution of this court, it is impossible that we can be made fully acquainted with all the circumstances, and there would be more danger of injury from revising matters of this kind, than would result now and then from an improper or arbitrary exercise of this discretion. It is not denied, that if the court had refused to open the judgment, the defendant would have been without remedy; and yet there is less danger in opening than in refusing to open a judgment. In the one case, the party is concluded, and in the other, he has an opportunity of a fair and impartial trial before a jury, who will give him the benefit, under the direction of the court, of an argument to be derived from lapse of time, and a consequent loss of vouchers, or other testimony. The practice of opening judgments, without stint or limit, except the sound dis-

[Kalbach, for the use of Reber, v. Fisher.]

cretion of the court, has obtained since the first settlement of the province, and I am yet to learn, it has been altered with any injustice to suitors. On the contrary, we all know, it has frequently been the means of unravelling the most secret and unjust schemes of oppression and fraud, which could not have been reached without a free and liberal exercise of this extraordinary power of the court. This complaint comes with a bad grace from the defendant. He has had an opportunity of trying his cause before a jury, and alleges no errors in the trial, but contents himself with simply contending, that by lapse of time, the defendant is prevented from investigating the merits of his case, or in other words, that an unjust demand is sanctioned by time alone. Two judgments were rendered, and the effect this ought to have, would be to make the Common Pleas more cautious in listening to the complaint of the defendant. It is by no means uncommon for indorsers to take an absolute judgment from the drawer of a note as an indemnity. The evidences of the real nature of the transaction sometimes rest in the memory of the witnesses, and sometimes are reduced to writing. As long as the indorsements continue, which is sometimes for years, it is necessary to revive the judgment by *scire facias*, which of course would be done by consent. In such a case could it be possible, that the Court of Common Pleas could not give relief against an unjust attempt to enforce payment of the money by execution, without regard to the time the judgment was rendered, or to the number of renewals by *scire facias*? I state this instance, in order to show the danger of attempting to limit the time of affording relief by application to the sound discretion of the court. The court are of opinion, that no writ of error lies to opening of the judgment by the Common Pleas, and that the judgment be affirmed.

Judgment affirmed.

Cited by Counsel, 1 Penn. R. 248; 3 R. 275; 7 W. 122, 140; 2 Barr, 418; 3 Barr, 461; 2 J. 252; 3 H. 408; 12 H. 494; 2 Wright, 31; 4 Wright, 373; 1 S. 189; 2 S. 431; 4 S. 322; 7 S. 453; 11 S. 186; 12 S. 501; 13 S. 448; 22 S. 364; 25 S. 482; 27 S. 300; 29 S. 396; 30 S. 161; 9 N. 330; 13 N. 76; 1 W. N. C. 208; 8 W. N. C. 212; 9 W. N. C. 45.

Cited by the Court, 10 H. 339; 1 S. 189.

*[LANCASTER, JUNE 1, 1829.]

[*325]

Rickert and Another *against* Madeira.

EJECTMENT.

The interest of a mortgagee, whether the mortgage be equitable or legal, cannot be taken in execution.

ON the trial of this ejectment, before his Honour Judge Smith, at a Circuit Court held for *Schuylkill* county, the plaintiffs, Richard Rickert and John Reed, after having shown title to the premises in controversy in Jacob Boyer and David Shubert, and a deed, bearing date the 3d of April, 1815, from Boyer and Shubert and their respective wives, conveying the premises in fee simple to John Hughes, for the consideration of seven hundred and seventy-five pounds, gave in evidence the following agreement :—

“Agreement made this 27th day of May, in the year of our Lord, 1815, between Jeremiah Reed of Manheim township, Schuylkill county, of the one part, and John Hughes, of the township of Schuylkill, county aforesaid, of the other part, witnesseth that the said Jeremiah Reed doth agree, and by these presents has agreed with the said John Hughes, to go his bail in a certain bond, payable to Jacob Boyer, of Montgomery county, and David Shubert, of the county of Lehigh, in the sum of eight hundred pounds, payable on the 10th day of April, A. D. 1817; together with three years’ interest on the same; upon which bond the said John Hughes is to receive a title for a certain tract of land, situate on the old Sunbury road—it being formerly Melcher Shubert’s plantation, now in the possession of John Deatrich, on the following conditions, that is to say: That the said John Hughes is to deliver the said title into the possession of the said Jeremiah Reed, as a pledge for his services for going the said bail, and nothing else; the said title to remain in the hands of the said Jeremiah Reed, until the said bond is paid, or other security, for the payment of the same, such as shall be deemed sufficient by any three disinterested and reasonable freeholders, and no longer: and it is further agreed, that if the said Jeremiah Reed is compelled to pay the same bond when due, the said John Hughes is to pay the damage the said Reed sustains by the payment thereof: and it is further agreed, that if the said Reed detains the said title longer than the said Hughes offers to comply with the said

[Rickert and another v. Madeira.]

agreement, then, in that case, the said Jeremiah Reed is to pay all the damage the said Hughes sustains by the said detainer. In witness," &c.

To July Term, 1817, Jacob Boyer and David Shubert brought suit against John Hughes and Jeremiah Reed, upon the bond [*326] mentioned *in the article of agreement, on which they obtained judgment. Jeremiah Reed having died, a *scire facias* issued against his executors. Judgment was rendered in the *scire facias*; on which execution issued, and a levy was made on the land in dispute, which was condemned. To a *pluries venditioni exponas*, the sheriff returned that it remained unsold for want of buyers. A judgment was likewise obtained by Richard Rickert against Jeremiah Reed for one hundred and twelve dollars, upon which sundry executions were issued, under which the land now in dispute, was sold by the sheriff to Richard Rickert and John Reed, the present plaintiffs, for four hundred dollars, who received the sheriff's deed for the same. The plaintiffs also proved, that the debt, interest, and costs, due in the suit brought on the bond for eight hundred pounds, given by John Hughes and Jeremiah Reed to Jacob Boyer and David Shubert, mentioned in the agreement, had been satisfied out of the estate of Jeremiah Reed.

The defendant, among other things, proved, that there was, on the 8th of February, 1829, due to Elizabeth Hughes, the wife of the said John Hughes, from Jeremiah Reed, as executor of the will of the said Elizabeth's father, the sum of four hundred and seventeen pounds three shillings and four pence, with interest from the 1st of November, 1818.

His Honour was requested by the defendant's counsel to charge the jury upon several points which they submitted to him, all of which presented the same question, viz.: Whether by virtue of the agreement of the 27th of March, 1815, Jeremiah Reed had such an interest in the land in dispute, as made it liable to be levied on and sold for his debts?

The opinion of the judge was in favour of the plaintiffs, for whom the jury found a verdict, with this condition, "That if the defendant shall pay to the executors of Jeremiah Reed, deceased, the sum of fifteen hundred dollars, on or before the 30th day of October, 1829, and pay the costs of this suit, the verdict and judgment be taken off, and judgment to be entered for the defendant."

A motion, made by the defendant's counsel, for a new trial, and in arrest of judgment, having been overruled, an appeal was entered.

Biddle, for the appellant, contended, that the agreement of

[Rickert and another v. Madeira.]

March 27th, 1815, constituted an equitable mortgage, and that the interest of a mortgagee, even under a legal mortgage, cannot be taken in execution. A mortgage, though in form a conveyance of the land, is now uniformly considered nothing more than a security for a debt; a mere chose in action, which goes to the executor. *Wentz v. De Haven*, 1 Serg. & Rawle, 219; *McCall v. Lenox*, 9 Serg. & Rawle, 304; *Jackson v. Willard*, 4 Johns. Rep. 41; *Runyan v. Mersereau*, 11 Johns. 534; 16 Mass. Rep. 345; 1 Pow. on Mort. 114; *Wharf v. Howell*, 5 Binn. 502; *Stoever v. Stoever*, 9 Serg. & Rawle, 434.

The jury had no right to prescribe the time of redemption.

**Leoser*, *contra*, argued, that the obvious intention [*327] of the agreement was to pledge the land itself as a security, and not merely the title deeds, and that every interest in land, whether legal or equitable, was subject to execution. He cited 2 Cruise's Dig. 92; 3 Pow. on Mort. 1050, 1051, 1055; *Shaupe v. Shaupe*, 12 Serg. & Rawle, 9; *Lessee of Humphreys v. Humphreys*, 1 Yeates, 427; *Carkhuff v. Anderson*, 3 Binn. 4; *Chahoon v. Hollenback*, 16 Serg. & Rawle, 425; *Richter v. Selin*, 8 Serg. & Rawle, 425; 20 Johns. 51.

The opinion of the court was delivered by

ROGERS, J.—This is an appeal from the decision of Justice Smith, in the Circuit Court held for the county of Schuylkill. The single question is, whether the article of agreement between Jeremiah Reed and John Hughes, vested such an interest in the land claimed by the plaintiffs, as to make it liable to be levied on and sold by the sheriff for a debt due by Reed or his executors. The first point to which we must direct our attention, is the nature of the agreement; for it is contended, that by the contract, Reed obtained an equitable interest, or estate, in the land itself. Reed agreed to go bail for Hughes in a bond to Jacob Boyer, in the sum of eight hundred pounds. As an indemnity to Reed, the contract was made, in which Hughes agrees to deliver the title to the tract in dispute, into the possession of Reed, as a pledge for his services in going bail, and nothing else. The title was to remain in the hands of Reed until the bond was paid, or other security given. The agreement further provides, that if Reed was compelled to pay the bond when due, Hughes was to pay any damage he might sustain; and that if he detained the title longer than Hughes offered to comply with the agreement, then Reed was to pay all the damage that Hughes might sustain. One of the alternatives provided for has happened, for Reed has been compelled to pay the eight hundred pounds for which he became security, and without question, has

[Rickert and another v. Madeira.]

a complete right of action against his principal. This is not denied; but it is contended, that they have mistaken their remedy. It will be remarked, the title only is deposited in the hands of Reed, and we are not left to conjecture for what purpose, for the parties themselves expressly say, as a pledge and nothing more, for his services in going bail. The possession of the land remains with Hughes, with a right of lien in Reed. Reed does not, as in the case of a legal mortgage, obtain the legal title; but the title papers are merely deposited with him as an indemnity for any eventual loss he might sustain, by reason of his responsibility as bail. It is then an equitable mortgage, by deposit of title deeds, which may be created by parol, or by written agreement, as here, which is the better and safer way, showing the nature and intent of the transaction. This, I believe, is no uncommon assurance in England, growing out of the equitable jurisdiction of the court, and relief is had in [*328] chancery. In one respect it differs from a legal mortgage, where the remedy is by foreclosure and transfer of the title to the land mortgaged. In an equitable mortgage, the chancellor decrees a sale of the land in payment of the debt; for it is but the security for the debt, and does not vest any interest, or estate, in the land itself. He cannot by any process obtain possession, for an ejectment will not lie as on a legal mortgage. In one sense, an equitable mortgagee may be said to have an interest in the land; that is, he has a lien on the land as a fund, for the payment of his debt. But a judgment creditor has precisely the same interest. The question then recurs, is this such an interest as is the subject of execution? There would not, perhaps, be much difficulty in distinguishing an equitable from a legal mortgage, as the legal mortgage is the absolute conveyance of the land, to be defeated on payment of the money loaned at a day fixed by the parties, and vesting the legal estate in a mortgagee, *eo instanti* the deed is executed. Not so in an equitable mortgage, for there the legal estate remains in the mortgagor; the land, whether at law or in equity, being but a pledge for the debt. As, however, doubts have been entertained, whether a mortgage be liable to execution, we would wish to be understood as deciding, that the legal and equitable mortgage, so far as regards this question, fall within the same principle. A mortgage must be considered either as a chose in action, or as giving title to the land, and vesting a real interest in the mortgage. In the latter case, it would be liable to execution; in the former, it would not, as it would fall within the same reason as a judgment bond, or simple contract. If we should consider the interest of the mortgagee as a real interest, we must carry the principle out, and subject it to dower, and to

[Rickert and another v. Madeira.]

the lien of a judgment ; the inconvenience of which, would have been intolerable, particularly at a time, when by law, the mortgagee had six months to record his mortgage. The same objections which may be urged against one judgment, being a lien on another judgment, will apply with equal force to the doctrine, that a judgment is a lien on a mortgage. That a mortgage is but a chose in action, a mere evidence of debt, is apparent from the whole current of decisions. A devise of a man's personal estate, carries with it all his mortgages. A mortgage may be released by an instrument not under seal, and an assignment of the bond, which usually accompanies the mortgage, transfers the right to the mortgage itself ; for whatever will give the money secured by the mortgage, will carry the mortgaged premises along with it. The forgiving the debt, although by parol, will draw the land after it as a consequence. The whole result of the case is, that a mortgage, although in form a conveyance of land, is in substance but a security for the payment of money ; and the debt being paid, or in any manner extinguished, the mortgagee becomes a trustee for the mortgagor. In consequence of the want of a Court of Chancery, our law differs from the law of England ; for in England a judgment only binds a legal interest ; in Pennsylvania, a *legal and equitable interest. In England, the relief is in chancery ; but here, we enforce payment by [*329] the common law process of execution ; and, hence, under the construction of the act of 1705, for taking lands in execution for payment of debts, an equitable as well as a legal title to land, has been considered as subject to the lien of a judgment. The extent of the decisions in Pennsylvania, and this will be found, upon a critical examination of all the cases, is to subject to execution all possible contingent titles in land, accompanied with an estate, property, or real interest in the land, whether that interest be legal or equitable. And for the soundness of this position, I refer generally, to the *Lessee of Humphreys et al. v. Humphreys*, 1 Yeates, 429 ; *Shaupe v. Shaupe*, 12 Serg. & Rawle, 12, and to *Streaper v. Fisher et al.*, 1 Rawle, 162. The doubt, whether mortgages are the subject of execution, does not seem to be peculiar to Pennsylvania, for in *Blanchard v. Colburn and wife*, 16 Mass. Rep. 346, the Supreme Court of Massachusetts have ruled, "That lands mortgaged, cannot be levied upon for the debt of the mortgagee, unless he shall have first entered on the land." And in *Jackson ex dem. Norton and Burt v. Willard*, 4 Johns. 41, the Supreme Court of New York have gone still further, and have decided, "That lands mortgaged cannot be sold on execution against the mortgagee, before a foreclosure of the equity of redemption, though the

[Rickert and another v. Madeira.]

debt be due, and the estate of the mortgagee has become absolute at law." Without undertaking to mark the extent of the doctrine in Pennsylvania, I agree with Chief Justice Parsons, "That the difficulties of levying upon lands mortgaged, are insuperable." The debt may require only a small part of the land to satisfy it, and several executions may be levied by several persons. This would throw difficulties in the way of the mortgagee, who would be unable to determine the amount of these several interests, which would not be compensated by any advantages which would attend the engrafting this new principle into the law of Pennsylvania, particularly when we consider the nice and intricate questions which would necessarily grow out of it. These difficulties have produced the almost universal opinion among the profession, that lands so situated, are not subject to the debts of the mortgagee by execution; and, it is an argument of no inconsiderable weight, that although mortgages are securities of such common occurrence, this is the first attempt which has been made to subject the interest of a mortgagee under a levy and execution.

The court are of the opinion, in which Judge Smith concurs, that the judgment be reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 3 Penn. R. 162; 2 Wh. 146; 3 Wh. 463; 4 Wh. 415; 6 Wh. 214; 6 W. 130; 9 W. 235; 10 W. 15; 4 W. & S. 93; 6 W. & S. 510; 7 W. & S. 295; 1 Barr, 493; 2 Barr, 337; 3 Barr, 461; 4 Barr, 124; 6 Barr, 229; 7 Barr, 169; 2 J. 345; 7 C. 418; 6 Wright, 343; 8 Wright, 520; 2 S. 360; 2 G. 132; 14 N. 148; s. c. 9 W. N. C. 229.

Cited by the Court, 1 R. 355; 3 R. 129; 4 R. 255; 3 Penn. R. 245; 5 Barr, 35; 1 H. 568; 4 H. 150; 2 Par. 163; 10 H. 363; 9 Wr. 463; 2 S. 138; 18 S. 225; 18 S. 322; 14 N. 150; s. c. 9 W. N. C. 230

[*330]

*[LANCASTER, JUNE 1, 1829.]

The President, Managers, and Company of the Middletown and Harrisburg Turnpike Road *against* Watson, Administratrix of Watson.

IN ERROR.

An agent of a corporation, who has received money for its use, cannot, in an action for money had and received, brought against him by the corporation, prove, by way of set-off, that he has paid the debts of the corporation, without showing a special authority for that purpose. And it is not enough to prove, that the defendant acted for the treasurer, without showing some resolution of the board, giving the treasurer a right to delegate his power to the defendant.

[The President, Managers, and Company of the Middletown Turnpike Road v. Watson, Administratrix of Watson.]

THIS case came before the court on a writ of error to the Common Pleas of *Dauphin* county, in which the plaintiffs in error were plaintiffs.

The cause was argued in this court by *M'Clure*, for the plaintiffs in error, and *Douglass*, for the defendants in error; after which the opinion of the court was delivered by

ROGERS, J.—This is a clear case. The plaintiffs bring suit to recover from the administratrix of the defendant certain moneys, received by the intestate as a manager and agent of the company, from delinquent subscribers. The defence is, that the money so received, was expended by the agent in the purchase of the debts of the company, and this the administratrix contends, is a legal set-off against the demand of the plaintiffs. The relation of principal and agent is well settled: as long as the agent acts within the scope of his authority, and no longer, he is protected. It was the duty of Watson to collect and pay over the funds as they came to his hands. It was for the company to direct the application of the money, when in the treasury, or under their control, to the discharge of their debts, the repair of the road, or whatever purposes they might suppose most beneficial to the corporation. This they have been prevented from doing, by an assumption of power by their agent, and a misapplication of the funds of the company. If such a breach of trust should be permitted, it would, in practice, lead to great abuses, by introducing a scene of speculation and fraud the most disastrous, and of the most secret and dangerous nature. A principal may give a special authority to his agent to settle and liquidate his debts, and this is frequently done; but previous to the introduction of such a defence, to a suit brought for money had and received, as agent, the special authority should be shown. It is said, the defendant proved by James Montgomery, that Watson acted for the treasurer; but they should also have shown some resolution of the board, giving the treasurer a right to delegate this power to the defendant. The testimony, to say the least of it, is most loose *and unsatisfactory, for I cannot believe, the treasurer in- [*331] tended to give Watson a general authority to discharge the debts of the company; nor was there any proof, that he gave him directions to pay the accepted order in favour of James H. Espy. The general expressions, "That Watson acted for the treasurer," were not a sufficient foundation for the introduction of the testimony; for no person could authorize him to pay the debts, except the company, and no resolution has been shown, which confers this right. The plaintiffs offered to settle the

[The President, Managers, and Company of the Middletown Turnpike Road v. Watson, Administratrix of Watson.]

case upon equitable principles, and allow what was actually paid by Watson; an offer, which to my surprise, was declined. It is the opinion of the court, the testimony was improperly received; that the judgment be reversed, and a *venire facias de novo* be awarded.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 4 Barr, 327; 2 G. 483; 15 S. 13, 14; 2 N. 366; s. c. 4 W. N. C. 282; 3 O. 378; s. c. 11 W. N. C. 228; 10 W. N. C. 424.

Cited by the Court, 9 Barr, 483; 10 H. 324; 3 O. 380; s. c. 11 W. N. C. 229.

[LANCASTER, JUNE 1, 1829.]

Unger against Wiggins.

IN ERROR.

Where it did not appear how long the defendant in an ejectment had been in possession of the land in dispute, a lessee of the plaintiff, under an old lease, who had probably been out of possession twenty years or more, and against whom no suit had been brought, was held, in the absence of further evidence to presume liability for mesne profits, not to be incompetent as a witness for the plaintiff, on the ground of interest.

Though the acts of a deputy surveyor, done for the benefit of A., cannot be given in evidence by him, in support of his own claim, without producing the authority under which the deputy acted, yet the unauthorized act of the deputy, done, or attempted by the procurement of A. may be given in evidence by B. to show the invalidity of A.'s title.

Where a book, purporting to be a book of a deputy surveyor, containing his field notes of a resurvey, had been frequently in evidence before the court, and three times in the very cause under trial, without any question, and no proof of handwriting was called for, but it was objected to on other grounds, held, that it was not error to permit it to be read to the jury, without proof that it was the book of the deputy surveyor or of his handwriting.

WRIT of error to the District Court of *Dauphin* county.

Ejectment, in which the plaintiff in error was defendant below, having been substituted as devisee in place of George Unger, deceased, the original defendant.

The cause came up on three bills of exception to evidence.

1st. Wiggins, the plaintiff below, offered in evidence (*inter alia*), a lease of the land in dispute, granted by himself to one Jacob Shrike, dated the 1st of March, 1797. After proving, that William Simonton, the only subscribing witness to the lease, was dead, he produced Shrike, the lessee, to swear that he saw [332] Simonton *subscribe his name to the paper as a witness to its execution. This was opposed as not being the

[Unger v. Wiggins.]

best evidence. Shrike himself, was also objected to as a witness, on the ground of incompetency from interest, having occupied the land some time under Wiggins, and therefore liable to an action by Unger for the mesne profits. The evidence was admitted, and a bill of exceptions sealed. The second exception was to the deposition of Thomas Smith, with a diagram and drafts annexed, which need not be further stated, as it was not relied upon by the counsel for the plaintiff in error.

3. The plaintiff below, further to maintain the issue on his part, offered to read in evidence, from a book of Bartram Galbraith, page 716, notes, purporting to be the field notes of the said Bartram Galbraith, of a resurvey made for George Unger the 19th of December, 1792; to which offer the defendant objected; but the court, on argument, overruled the said objection, and directed the said notes, without further proof, to be read to the jury. The third exception was thereupon taken. Galbraith was dead at the time of the trial.

Elder, for the plaintiff in error.—Shrike, the witness, was liable to an action for mesne profits, unless the plaintiff below recovered the land. He was called, therefore, to testify for himself. As to the book said to be Bartram Galbraith's, it was admitted in evidence expressly without further proof; that is, without proof of any authority to make the resurvey; without proof of any request, procurement, or knowledge of Unger, and without the least pretence of proof to the jury that the book itself was Galbraith's, or even of the handwriting. As to authority, none could possibly exist for the resurvey. It was of a tract already patented. Had the plaintiff below proved any agency or consent in the defendant, or those he claims under, it might have been evidence against him, though an unwarranted act. No proof of the kind was attempted; yet it was easily to be procured if the fact had been so. Why were not the chain carriers produced, or some one who was present, or at least the lines on the ground proved? The defendant is not to be held bound by the unauthorized act of a deputy surveyor; far less is he to be bound by the mere private declarations of a surveyor, without evidence, except from those declarations that the act itself has ever been performed. The declarations of the deputy surveyor are not evidence, though he dies before trial, and all his papers are burnt. *Bonnet v. Devebaugh*, 3 Binn. 175. A survey is not to be admitted without producing the authority for it. *Wilson v. Stoner*, 9 Serg. & Rawle, 39. Even supposing the book to have been brought from the surveyor's office, yet every document from the office is not therefore official. *Vincent v. Lessee of Huff*, 4 Serg. & Rawle, 299, relied on against us,

[*Unger v. Wiggins.*]

is the very doctrine we contend for. It proves that not the declarations only of the deputy surveyor, but even his acts, if [*333] without authority, are evidence *against no one. Here, if the book had been otherwise admissible, there was no semblance of authentication.

Douglas and G. Fisher, for the defendant in error.—It is very true, there was no direct formal evidence, that the book offered, was what it purported to be, and was from the deputy surveyor's office, nor that the handwriting was Mr. Galbraith's; for, indeed, the book and the handwriting were both as well known in our court-house, as the face of the gentleman himself while living. The necessity of swearing witnesses to the identity of the one or the other, would hardly occur to the mind; and this cause having been already tried three or four times, and the same book read on every trial, we may be excused for not offering on oath, solemn proof, which nobody asked for, of facts which nobody doubted. It is impossible to imagine, that the resurvey for Unger's benefit, was not procured and paid for by him. The plaintiff might very safely be challenged to produce the chain carriers after the lapse of more than thirty years, and when the transaction of the time must, from the nature of it, have been unknown to him. So far from denying that there was no pretence of authority from Unger's resurvey, it is what we chiefly insist upon. We offered the evidence for the sole purpose of showing, that this bare act of injustice was the only shadow of title at that time against our client. They cited *Miller v. Carothers*, 6 Serg. & Rawle, 215; *Vincent v. Lessee of Huff*, 4 Serg. & Rawle, 299; *Farmers' Bank of Lancaster v. Whitehill*, 16 Serg. & Rawle, 90.

The opinion of the court was delivered by

Top, J.—The subscribing witness being dead, proof of his handwriting appears to have been well enough made out by one who saw him put his name to the very paper. I think no interest was shown to exclude Shrike as a witness. His lease was in 1797. How long Unger, the defendant below, against whom the witness was called, had been in possession of the contested spot, did not appear. But as no suit had been brought against Shrike for such a great length of time, and he had been out of possession probably twenty years or more, it would have been wrong, without further evidence, to presume, that any liability for mesne profits still existed against the witness. As to the admission of the book, purporting to be Bartram Galbraith's, and the field notes of the resurvey of the 19th of December, 1792, it had been shown already in the cause, that Unger, the defendant

[Unger v. Wiggins.]

below, held one hundred and eighty acres on a warrant and patent, in the name of Jacob Garver, granted prior to the revolution; the piece of land in dispute being about twenty-two acres, adjoining the said one hundred and eighty acres tract of Unger. Wiggins, the plaintiff below, claimed the twenty-two acres under a warrant for one hundred acres, dated the same 19th of December, 1792, granted to George Runion, and calling for Jacob Garver's survey as one of its boundaries; that is *to say, covering the ground in question in this cause. [*334] On this warrant for one hundred acres, Mr. Galbraith was the surveyor who made the survey for Wiggins; and in making it, instead of adjoining the line of Unger, it appears that he left out the twenty-two acres, now in dispute, next to Unger's tract. Wiggins complained of this as injurious to him, and as excluding some of the best of the land. Therefore, he, Wiggins, petitioned the Board of Property, and obtained an order for a resurvey. And on the 21st of May, 1806, a resurvey was made for him by Levy G. Hollingsworth, deputy surveyor, of one hundred and a half acres, including the land in dispute, according to the call of the warrant, and throwing off a part of the former survey next the mountain. But before this resurvey by Hollingsworth for Wiggins, viz., on the 6th of January, 1802, Unger had obtained a warrant for thirty acres, and on the 17th of the same month, a survey on it, including the twenty-two acres in question. There were other matters of fact contested in the cause not material to be stated. Galbraith's book and notes of the resurvey were objected to on behalf of Unger, because the resurvey being wholly without authority, could not be legal evidence; and, because there was no proof of the resurvey having been attempted at the request, or with the knowledge of Unger, the defendant, or of any one under whom he claimed. These objections were overruled by the court below, very rightly, in my opinion. Because, by the rule of law, the act of a deputy surveyor, done for the benefit of A., shall not be given in evidence by A. to support his own claim, without producing the authority under which the deputy acted, it by no means follows, that the unauthorized act of the deputy, done, or attempted by the procurement of A., shall not be given in evidence by B. to expose the invalidity of A.'s title. Here, the total absence of all pretence of right to extend the lines of Unger's patented tract, so as to include the twenty-two acres, was the very matter which made the evidence material to the plaintiff below. It was strong proof, that Unger, on the day of the date of the plaintiff's warrant, had no legal or equitable title to the land. Equally strong was it to support the allegation of Wiggins, that the first survey on his warrant, by Mr. Galbraith,

[*Unger v. Wiggins.*]

had been returned injuriously, by throwing out the land in question ; and strong, also, to show for what purpose, and in whose favour the thing was so done. But, it is said, the unlawful act of the deputy shall not be thus visited upon Unger, without some evidence to show Unger's procurement, or in some respect, to implicate him in the matter. Most clearly the law is so. But equally clear it is, in my opinion, that the able judge (the Hon. Charles Smith,) who tried this cause, peculiarly versant in these questions of original title, and whom, as he is no longer on the bench, I may be permitted to mention in this way, so directed the jury. We have not the charge before us, nor was it expected to by either party. Unger's concurrence in the resurvey, was a matter of fact. Though it was a fact to be proved, yet [*335] it was *not required to be proved by an eye-witness. Unless contradicted, or explained, the evidence to implicate Unger, would seem to me almost conclusive. The illegal resurvey was all for Unger's advantage, or supposed advantage, and in no way for the advantage of Galbraith, or of any other person. Unger claimed the ground thus taken in by the resurvey, and his devisee yet claims it. He owned the tract thus attempted to be enlarged ; and on the first survey on Wiggins' warrant, made on the 13th of August, 1795, Mr. Galbraith notes on the margin of the draft, the land in dispute as the property of Unger.

It is said, there was no proof that the book had been Mr. Galbraith's, or of the handwriting ; and so it does appear from the record. But it is not denied that the book had been before in evidence innumerable times in the courts of Dauphin county, and three times in this same cause, without any question ; and, that there was no call for proof of handwriting. This part of the case would, therefore, seem to fall under the rule applicable to matters of practice, that sometimes, what is expressly denied is admitted ; and, that to specify some objections to evidence, waives all objections not mentioned.

Judgment affirmed.

Cited by Counsel, 8 S. 284.

[LANCASTER, JUNE 1, 1829.]

Rahm, Executor of Kapp, *against* The Philadelphia Bank.

IN ERROR.

When a promissory note is payable at a particular place, such as a bank, and on a particular day, and the indorsee is at bank until it closes, at the usual hour, on the day on which the note falls due, ready to receive payment, no further demand on the drawer is necessary, in order to charge the indorser.

Verbal notice, to the indorser, of non-payment by the drawer is sufficient.

The act of assembly incorporating the Philadelphia Bank, by the terms of which, notes discounted by that bank, are placed on the same footing as foreign bills of exchange, does not render a protest and notice thereof to the indorser necessary, in order to charge him.

WRIT of error to the Court of Common Pleas of *Dauphin* county.

The Philadelphia Bank was plaintiff below, and sued on the following note, indorsed by Kapp, and discounted by the bank :

"*Harrisburg, December 12th, 1814.*—Sixty days after date, I promise to pay to Michael Kapp, or order, at the Office of Discount and Deposit, Harrisburg, without defalcation, fifteen hundred dollars, for value received.

"SAMUEL LAIRD."

*It was in evidence, that Fahnestock, the president, on the day of payment, the 13th of February, 1815, after [*336] the board of directors had broken up, seeing Kapp, told him the note was not renewed ; that he, Kapp, had better renew it, or the note would be under protest ; to which Kapp answered, that he would indorse no more for Laird. It also appeared, that Carson, a clerk in the bank, on the same 13th of February, after bank hours, by direction of the cashier, took the note to Kapp to demand payment, or a renewal, when he replied, that he would do nothing in it ; that afterwards, on the same day, Carson carried the note to a notary public, who then protested it. The notary neither gave nor sent any notice to Kapp ; but, the next day, the 14th, the same clerk, by the direction of the cashier, went to Kapp, and told him the note was protested, and requested him to pay it off, or have it renewed. Before the note became due, Laird, the drawer, had died, and administrators of his estate had been appointed.

[Rahm, Executor of Kapp, v. The Philadelphia Bank.]

On the trial, the plaintiff below requested the court to charge the jury as follows:—

“1. That when the note is payable at a particular place, such as a bank, and on a particular day, and the indorsee was there until the bank closed, at the usual hour of closing the bank, on the day it fell due, ready to receive payment, no further demand on the promiser is necessary to charge the indorser.

“2. That there is no particular form of notice, to the indorser of a note, prescribed by law; it is enough if under all circumstances it puts him on inquiry; and this may be as well a verbal as a written notice; and this notice may be given by any person authorized to give such notice; and that the agency of a notary-public is not necessary to give such notice, nor is it his duty to do so.

“3. That a protest of a promissory note, or inland bill of exchange, and notice thereof, are not necessary to charge the indorser—this doctrine only applies to foreign bills of exchange.

“4. Here the defendant lived in the town where the bank was held; no written notice was necessary; verbal notice in this case was more regular.

“5. That the act of assembly, incorporating the Philadelphia Bank, and which places notes, or bills discounted at that bank, on the footing of foreign bills of exchange, applies only to the case of defalcation, and does not alter the nature of the promissory note, so as to require a protest, as in case of a foreign bill of exchange.

“6. That this suit is founded on a promissory note payable at the Office of Discount and Deposit at Harrisburg, where both the drawer and indorser lived—and verbal notice was given by John Carson, a clerk in the bank, after the bank closed, on the same day the note fell due, by presenting the same to the indorser, Michael Kapp, the defendant in this cause, that the note was not paid; and a request to pay the same, or [*337] renew it with another note, was made, *which was sufficient to charge the indorser without protesting the note, or producing a copy of a protest of the same note to the indorser.

“7. That it having been proved in this cause by the notary public, that the note was regularly protested on the day it fell due, and after the hour of closing the bank, notice of which protest was given to the defendant on the next day, by a regular clerk of the Office of Discount and Deposit, this is sufficient notice in law, to charge the indorser, without producing the protest to him.”

[Rahm, Executor of Kapp, v. The Philadelphia Bank.]

The court, in their charge to the jury, among other things, stated, "That demand of payment of a note at the Office of Discount and Deposit, is sufficient, if the note is drawn payable at the said office, for in such cases, the payment of the note at the Office of Discount and Deposit, is part of the contract. But where no time and place are fixed for the payment of a note, there must be a demand on the drawer.

"If the Office of Discount and Deposit was the owner of the note, and held the note on the day, and at the place mentioned in it for payment, and was ready to receive the money, notice to the drawer to pay it was not necessary, nor was a demand on the administrators of Mr. Laird, (who died before the note fell due,) necessary: a notice, by the clerk of the Office of Discount and Deposit, sent for the purpose, to the indorser, of the default of payment by the drawer, is good notice if it be given in due and proper time.

"Verbal notice is sufficient—a written notice is not necessary. No form of notice to the indorser is prescribed by law. All that is necessary is, that he should have such notice, either verbal or written, given in time, as will inform him of the default of payment by the maker or drawer, so as to put him on an inquiry, and prepare him to pay it, or defend himself.

"No protest was necessary; and notice of a protest was not required or necessary to be given to Michael Kapp. It is sufficient if the indorser receives notice in a reasonable time, of the non-payment of the note by the drawer. The provision in the third section, article tenth, of the act incorporating the Philadelphia Bank, 4 Smith, 152, 153, which places notes discounted by the bank, 'on the same footing with foreign bills of exchange,' is for the purpose of preventing a defalcation or set-off by the drawer against the indorsee, of such equitable matters and circumstances to which the note was subject in the hands of the indorser. 2 Dall. 263. A protest is not essentially necessary to enable the indorsee of a note to recover; but is indispensably requisite in the case of a foreign bill of exchange.

"It is contended by the defendant's counsel, 'that there is no evidence that Mr. Laird, or his administrators, had not funds in the Office of Discount and Deposit, to meet the payment of the note.' There is evidence of a protest of the note; and this protest *is *prima facie* evidence of the fact that there were no funds there: if there were funds there, it lies [*338] on the defendant to show the fact.

"And although this protest is stated to be made at the request of the 'Office of Discount and Deposit,' this does not render the protest void; for it is not necessary that it should be

[*Rahm, Executor of Kapp, v. The Philadelphia Bank.*]

stated, that it was made at the request of the Philadelphia Bank. Nor does the delay in bringing suit, for two years, in law, discharge the indorser.

"Did Michael Kapp receive notice on the 13th of February, 1815, that the note was not paid? This is a fact for the jury to ascertain from the evidence. If Michael Kapp did not receive such notice on that day, he would be discharged from his liability as indorser. If he did receive such notice on that day, he will be liable for the payment of the note. As he lived in the same town with the other parties, notice ought to have been given on the same day, the 13th of February, 1815; for the earliest notice ought to be given. Notice given on the next day is not sufficient."

The counsel for the plaintiff excepted to the charge of the court on the seventh point, and the residue of the charge was excepted to by the counsel for the defendant. The verdict was for the plaintiff, and the defendant took a writ of error.

The following errors were assigned in this court :—

"1st. That the court erred, in law, in charging the jury on the plaintiff's points, Nos. 1, 2, 3, 4, 5, and 6.

"2. The court gave it as the law, that no protest was necessary to charge the indorser, and create a liability in him to pay.

"3. That there was no demand of payment of the note made of the payer, Samuel Laird, or of his representatives, when the note fell due; and, no notice of a demand of, and non-payment by the payer, given to the indorser, as required by law; and, that the statements filed in the cause, set out no cause of action.

"4. That the court erred in their general charge to the jury, in stating, that demand of payment of a note, at the Office of Discount and Deposit, is sufficient, if the note is drawn payable at the said office: that if the Office of Discount and Deposit was the owner of the note, and held the note on the day, and at the place mentioned in it for payment, and was ready to receive the money, notice to the drawer to pay it was not necessary; nor was a demand on the administrators of Mr. Laird (who died before the note fell due), necessary; and, that a notice by the clerk of the Office of Discount and Deposit, sent for the purpose to the indorser, of the default of payment by the drawer, is good notice, if it be given in due and proper time: That no protest was necessary; and notice of a protest was not required, or necessary to be given to Michael Kapp; and it is sufficient if the indorser receives notice in a reasonable time of the non-payment of the note by the drawer. And that the provision in the third section,

[Rahm, Executor of Kapp, v. The Philadelphia Bank.]

article tenth, of the act incorporating *the Philadelphia Bank, 4 Smith, 152, 153, which places notes discounted [*339] by the bank, 'on the same footing with foreign bills of exchange,' is for the purpose of preventing a defalcation, or set-off by the drawer against the indorsee, of such equitable matters and circumstances to which the note was subject in the hands of the indorser," &c.

Douglas and *Elder*, for the plaintiff in error, argued, That there is no averment in the record, nor was there any proof, of demand on the drawer, or his representatives. Demand is necessary, or an effort to make it. *Chitty on Bills*, 279; *Duncan v. M'Cullough*, 4 Serg. & Rawle, 481. It is immaterial at what place the note may be payable, under the circumstances of the case. The indorser is but a surety. His promise is conditional. Only the law merchant makes him liable. *M'Kinney v. Crawford*, 8 Serg. & Rawle, 353. There is no dispensing with notice on account of death, bankruptcy, &c. *Gibbs v. Cannon*, 9 Serg. & Rawle, 201. Nearly every point of this case seems decided by the case of *The Juniata Bank v. Hale*, 16 Serg. & Rawle, 159. But the act of assembly is conclusive. The words are absolute and peremptory. "And all notes, or bills, at any time discounted by the said corporation, shall be, and they are hereby placed on the same footing as foreign bills of exchange; so that the like remedy shall be had for the recovery thereof against the drawer and drawers, indorser and indorsers, and with like effect, except so far as relates to damages, any law, custom or usage to the contrary thereof, in any wise notwithstanding." 4 Sm. L. 152, sec. 3d, art. 10th. Now, the rule contended for is, that a protest of a foreign bill of exchange must be made, and legal notice of the protest given, or sent, unless as against him who draws without funds in the hands of the drawee. *Rob. Dig.* 378, *et seq.*; *Gale v. Walsh*, 5 T. R. 239; 1 Selw. N. P. 321; 2 T. R. 713; 2 Comm. 467, &c.; *Chitty on Bills*, 279, *et seq.*; *Ib.* Appendix, Narr. on Foreign Bills; *Lenox v. Leverett*, 10 Mass. 1. Indeed, what possible use can there be in a protest, if it is to be concealed, and no information of it given?

Shoch and *G. Fisher*, *contra*, denied, that giving a copy of the notice was necessary, either by the mercantile law, or by the act of assembly. The protest, itself, is unnecessary on a note, or inland bill. *Chitty on Bills*, 276, 284; 5 Johns. Rep. 375; *The Bank of North America v. M'Knight*, 1 Yeates, 145. As to the words of the charter relied on, their sole intent was to obviate the mischiefs of set-off. It was so decided on the same words in another law, in the case of *Roberts v. Cay's Executors*,

[*Rahm, Executor of Kapp, v. The Philadelphia Bank.*]

2 Dall. 260. This decision was followed in the construction of much stronger words of a bank charter, in the case of the Farmers' and Mechanics' Bank *v. Massey's Executors*, 2 Serg. & Rawle, 114, and *Wolffersberger v. Bucher*, 10 Serg. & Rawle, 10. Here notice of the protest was in fact given. Even were it the very case of a foreign bill *of exchange, the decision of [*340] the court below was right. 1 M. & S. 289; *Ib.* 545; 3 Camp. 334; 2 Johns. Cas. 337 · 10 Johns. Rep. 490; 11 Johns. 231; *Chitty on Bills*, 289.

The opinion of the court was delivered by

Top, J.—The errors alleged may, for the sake of shortness, be reduced to three. 1. In deciding that no demand was requisite upon Laird, the maker of the note, or upon his representatives. 2. That verbal notice by the clerk of the bank, was sufficient. 3. In deciding that under the words of the act of assembly, incorporating the bank, both the notice of protest, and the protest itself, were unnecessary.

On the two first allegations of error, there is not, except from the peculiar wording of the act of assembly, the least doubt with any member of the court. We all agree, that in the common case of a note, under the circumstances here appearing, it would have been unnecessary to make any demand of the drawer, or of his representatives. *Chitty on Bills*, 395, 295, 297; *Berkshire Bank v. Jones*, 6 Mass. 524. Also, that the agency of a notary public was unnecessary, and that the verbal notice sent by the clerk of the bank was sufficient. *Chitty on Bills*, 276, 284, 293, 295, 297; *Bank of North America v. M'Knight*, 1 Yeates, 145; s. c. 2 Dall. 158.

On the third point; was a protest, and notice of the indorser, rendered necessary by the words of the act of assembly, placing notes discounted at this bank on the same footing with foreign bills of exchange? It seems to me not. As to the reason for imposing, per force, this troublesome formality upon the bank and the dealers with it, a formality which may be dispensed with, if the holder pleases, in every common case of a note or inland bill; it is not even alleged, that any reason exists. But it is argued, the words of the law are positive to that effect. They are not so in my opinion. Clear it seems to me, that the legislature had not the remotest intention to lay down any indispensable form of proof, or to change the law of evidence, but only to secure the bank from loss or dispute, arising out of the previous dealings between the parties to a note or bill discounted, and from all defence of want or failure of a consideration. It seems very common in statutes providing for any species of negotiable paper, against the strict rule of the com-

[Rahm, Executor of Kapp, v. The Philadelphia Bank.]

mon law, to declare the intent by express reference to foreign bills of exchange. There are similar words in most, if not all of our bank charters. So, in the first and second acts of congress, creating the bank of the United States. In the very act of assembly in question, the usual bank notes to be issued by the bank of Philadelphia, though not under their seal, shall be binding and obligatory upon the corporation, in the like manner, and with the like effect, as foreign bills of exchange now are. Now, it will hardly be contended, that a note of this bank, payable to A. B. or bearer, may *not be sued on by C. [*341] D. without the forms of protesting. But I take the question to be already settled. On the same words in the charter of the bank of Pennsylvania, this court held, in *Roberts v. Cay's Executors*, 2 Dall. 260, that a note thus discounted, was placed on the footing of a foreign bill of exchange, only as to the remedy and the exemption from set-off. And in effect this decision was followed up in the cases of the *Farmers' and Mechanics' Bank v. Massey's Executor*, 2 Serg. & Rawle, 114, and *Wolfersberger v. Bucher*, 10 Serg. & Rawle, 10. There would seem to be another ground upon which this judgment might be sustained. Admitting that the case requires the same evidence which would be required to support an action on a foreign bill of exchange, sent from a distant country, yet it seems to be the settled mercantile law, that neither the copy of the protest, nor notice of it, need be given or sent, in the case of a foreign bill, where the party to be affected happens to be in the country at the time of the refusal to accept or to pay. My opinion is to affirm the judgment.

ROGERS, J., and SMITH, J., concurred in the above opinion. GIBSON, C. J., and HUSTON, J., dissented.

Judgment affirmed.

Cited by Counsel, 6 Barr, 167; 9 S. 82; 15 N. 136.

Cited by the Court, 4 W. & S. 511; 5 W. & S. 94; 5 Wright, 326.

[LANCASTER, JUNE 1, 1829.]

The Mechanics' Bank of the City and County of Philadelphia *against* Fisher.

APPEAL.

A power of attorney to the prothonotary to discontinue a suit, cannot be executed by his clerk.

A plaintiff will not be permitted to discontinue, where it will give him an advantage, or tend to vex and oppress the defendant.

Therefore, where the plaintiff, residing in Philadelphia, brought suit in Dauphin county, and the defendant took out a rule of arbitration, and went to Philadelphia to serve it on the plaintiff, who immediately sent a power of attorney to the prothonotary of Dauphin county to discontinue the suit there, and sued the defendant again in Philadelphia, notwithstanding which, arbitrators were appointed in Dauphin county, who proceeded to make an award in favour of the defendant; against which proceedings, the attorney of the plaintiff protested, and applied to the judge at the Circuit Court to set them aside, who did so: held, on an appeal, that the discontinuance was improper, and the proceedings subsequent to it valid.

THIS was an appeal by the defendant from a decision of Tod, J., at the Circuit Court in *Dauphin* county, setting aside, on motion of the plaintiff, a rule of reference and an award of arbitrators. The action was by summons in debt on bond, not exceeding five thousand dollars. The material facts appeared on the record, and were as follows:

[*342] *On the 19th of July, 1828, the defendant entered a rule of reference, declaring his intention to have arbitrators chosen on the 9th of August, 1828. On the 24th of July, this rule was duly served by the defendant on the plaintiff. On the 26th of July, the plaintiff made the following order of discontinuance:—

“Know all men by these presents, that the Mechanics' Bank of the city and county of Philadelphia, have nominated and appointed Obed Fahnestock, prothonotary of the Circuit Court of Dauphin county, their true and lawful attorney, to discontinue any suits brought by the said Mechanics' Bank of the city and county of Philadelphia, or in their corporate name, against George Fisher, Esq., in the Circuit Court of Dauphin county, or in the Common Pleas of Dauphin county. In witness whereof, the said Mechanics' Bank of the city and county of Philadelphia, hereunto set their common seal this 26th day of July, A. D. 1828.

“[SEAL.]

“Attest, J. LAMB, president.”

[The Mechanics' Bank of the city and county of Philadelphia v. Fisher.]

This paper was, on the 28th of July, filed in the office; and on the same day, a discontinuance of the action was entered on the docket by Charles H. Snider, the clerk of the prothonotary. On the same day, the defendant's attorney filed of record, in the cause, a paper as follows:—

“The defendant objects to the discontinuance of this suit, as a rule to refer has been taken out, and served upon the president and cashier of the Mechanics' Bank of the city and county of Philadelphia; and, also, objects to the payment of the costs.

“SAMUEL DOUGLAS.”

Next followed this entry:—

“August 8th, 1828.—The discontinuance of the above suit being objected to, Francis R. Shunk, Esq., attorney in fact for the plaintiff, from abundant caution, discontinues the above suit, and protests against the appointment of arbitrators, or any other proceedings in this suit. See paper filed.”

Arbitrators were appointed in the following manner:—

“And now, to wit: 9th of August, 1828, Samuel Douglas, Esq., attorney for the defendant, appears for the defendant; the plaintiff not appearing, Francis R. Shunk appears by special warrant of attorney for the bank, and protests against choosing arbitrators, and refuses to have his name put on record as attorney for the bank; says, the suit is discontinued. Mr. Douglas insists upon choosing arbitrators, and the prothonotary is to choose for the bank, because, as he says, the suit is not legally discontinued. Arbitrators to be five, viz:—

“John Rhodes,	by the prothonotary,
“John Davies,	“ defendant,
“Frederick Heisely,	“ prothonotary,
“Warner Holbrook,	“ defendant,
“John Whitehill,	“ prothonotary.”

*Due notice of the time and place of the meeting of the arbitrators was served on the plaintiff at the bank-ing-house. [*343]

On the 12th of September, the following award was filed:—

“We, the arbitrators, as above named, having met at the time and place appointed, having been severally sworn and affirmed, according to law, (*Francis R. Shunk* appearing as agent for the plaintiff, and *Samuel Douglas, Esq.*, attorney for the defendant,) do report, that we find no cause of action: plaintiff for costs.

[The Mechanics' Bank of the city and county of Philadelphia v. Fisher.]

Witness our hands, September 6th, 1828." Signed by all the arbitrators.

On the 1st of October, exceptions to the award were filed, viz. :—

"1st. That the report is void and contrary to law, there being no cause in court at the time of the appointment of arbitrators, the above suit having been discontinued.

"2. The report states, that F. R. Shunk appeared before the arbitrators as agent for the plaintiff, and does not state, that Francis R. Shunk, as the special attorney for the Mechanics' Bank of the city and county of Philadelphia, appeared before the arbitrators for the sole purpose of exhibiting to the arbitrators the evidence of the discontinuance of this cause, giving them notice of the discontinuance, and protesting against any further proceedings being had in the cause; and praying that the evidence and notice so given, and objections to the proceedings might be noted upon the record of the proceedings of the arbitrators, which fact appears from the statement of four of the arbitrators hereunto annexed.

"FRANCIS R. SHUNK."

To these exceptions were appended the oath of F. R. Shunk to their truth, and the following certificate :—

"We, the arbitrators, appointed in the above cause, do state, that at the meeting of the arbitrators, on the 6th of September, 1828, at the house of J. B. Henzey, in the borough of Harrisburg, Francis R. Shunk, as the special attorney of the Mechanics' Bank of the city and county of Philadelphia, appeared before us, and presented a certified copy of the record of the above stated cause, accompanied with a notice and protest against any further proceedings, which paper we have filed in the prothonotary's office, with our report: That he appeared before us for no other purpose, as he then stated; but after having presented the said copy of the record, notice, and protest, he withdrew.

Harrisburg, Oct. 1st, 1828."

Signed by four of the arbitrators.

The judge at the Circuit Court, having, as already mentioned, set aside the report of the arbitrators, the defendant appealed to this court, and filed the following reasons :—

"Reasons from appealing from the decision of the Circuit Court in granting the motion to set aside the report of the arbitrators, and all subsequent proceedings in the above stated cause.

"1st. Because a rule to choose arbitrators, under the com-

[The Mechanics' Bank of the city and county of Philadelphia v. Fisher.]

pulsory *act of the 20th of March, 1810, was duly entered by the defendant, and served upon the plaintiff; [*344] and a suit for the same cause of action was instituted in Philadelphia, and the writ served before any attempt to discontinue the above suit, and after the service of the said rule to choose arbitrators.

"2d. That there is no legal right to discontinue the suit on the special power of attorney to Obed Fahnestock, Esq., the prothonotary of the Court of Common Pleas of Dauphin county, from the plaintiff, by C. H. Snider, his clerk, who entered a discontinuance of the said suit in the absence of the said prothonotary, and without his order and consent: That both this discontinuance and that entered by Francis R. Shunk, Esq., as attorney in fact for the plaintiff, were subsequent to the service of the said rule to choose arbitrators, and were illegal and void.

"3d. That the plaintiff could not discontinue the cause under the then existing circumstances, (*prout* the record and service of the said rule,) without the consent of the defendant, or his attorney.

"4th. That the arbitrators were appointed, made out, and returned to the clerk of the Circuit Court of Dauphin county their report, according to law, in favour of the defendant; and the said report had lawfully become a judgment in favour of the defendant before the motion was made in the Circuit Court, to whose decisions these exceptions are filed, (*prout* the record.)

"5th. And, that during the pendency of the said rule to choose arbitrators, and the proceedings under it, neither the plaintiff, nor any court, had legal authority to discontinue this suit without the consent of the defendant; because, the said cause was not pending in the said court, but had attached in another tribunal."

Douglas argued for the appellant.—The power to enter the discontinuance was special to Fahnestock, the prothonotary, and the entry by Snider, under the pretence of it, was a nullity. The second discontinuance, by the attorney, was no better. It was after the reference; after the cause was out of court. Discontinuance is, like a nonsuit, an act of the court, and will not be permitted when injurious to the other party. The second writ is for the same cause. It is not alleged there was any mistake in the first action. The plan of ending the suit already brought, and commencing another in Philadelphia, was merely for the advantage of the plaintiff, and to the great detriment of the defendant. He had incurred all the expense and trouble

[The Mechanics' Bank of the city and county of Philadelphia v. Fisher.] of entering the rule of reference, serving the notice, employing counsel, and preparing for the trial. He was under the protection of the law in the act of serving the rule, when the new writ was taken out against him. Suppose leave to discontinue, had been applied for under these circumstances, would it have been granted? Certainly not. And if the court would not permit the thing to be done if asked for, they will not sanction it when attempted without their permission. The defendant had the right of pleading the pendency of the former proceedings in abatement of the new writ. [*345] *So, a defalcation might have been offered. All these fair and legal advantages are taken away from him by the decision of the Circuit Court. Payment of the costs could be no amends. The plaintiff had made his election, and is bound by it. The bank chose to sue in Dauphin county. Besides, the cause was out of court, and not subject to a discontinuance. The jurisdiction of the arbitrators had attached. The plaintiff's only remedy against the award was by appeal, according to the act of assembly. *Bigler and Stall v. Landis*, in this court, Lancaster, May 1825, (MSS.) decided, that a cause under a rule of reference, cannot be put down for trial in court. Reference puts a cause out of court, and an award is a record, and a judgment, upon which execution issues. *Thompson v. White*, 4 Serg. & Rawle, 135. The court below shall not correct an award of arbitrators, though illegal on the face of it. *Post v. Sweet*, 8 Serg. & Rawle, 391; *Girard v. Gettig*, 2 Binn. 234. The plaintiff is not permitted to withdraw his suit to the injury of the defendant. *Lewis v. Culbertson*, 11 Serg. & Rawle, 59.

Shunk, contra.—The question is, whether by law, the plaintiff could discontinue. Circumstances are mentioned in the argument, which, from want of instruction, can neither be admitted nor denied. If a new suit has been brought for the same cause, let the defendant plead to it the pendency of the first action, provided the discontinuance is invalid. The notice served upon the bank to produce their books before the arbitrators at Harrisburg, is a very sufficient answer to the complaint of oppression, and a very good reason for preferring to have the cause decided nearer home, rather than in Philadelphia. A plaintiff may always sue in any manner most convenient to himself, provided it be permitted by the law. The warrant directed to Mr. Fahnestock, the prothonotary, from the bank, being filed, was itself a discontinuance. It would be strange if the clerk may act for his principal in anything else—may enter judgments, and administer the oath on appeal

[The Mechanics' Bank of the city and county of Philadelphia v. Fisher.]

—and yet may not enter on the docket the substance of a paper filed in the office, under the hand and seal of a party. But the second discontinuance, the formality of which appears to be unexceptionable, was entered on the record, not only before the arbitrators met, but one day at least before they were nominated. No declaration was filed, no proceedings in the cause had, no costs incurred, except by the defendant himself, and those were all paid by the plaintiff. It is agreed there are cases where one cannot discontinue his own process; as in replevin, or after a special verdict, or a demurrer, or plea of defalcation, or after arbitrators have met, and their opinions have been discovered, or a jury is ready at the bar to give a verdict; and, perhaps, after arbitrators have been chosen. With these exceptions, not one of which has the least possible bearing upon the case before the court, a plaintiff, upon paying costs, may go out of court at his own option as readily as he may come in. It is said the cause was out of court by the reference. What is contended for is, that the discontinuance *was not an act of the court, nor an act in court; and [*346] that a cause referred, is not out of the reach of the parties: And further, that by our practice, there is no substantial difference in reason or law, between a nonsuit in court and a discontinuance out of court. They are but different modes of effecting the same thing; the giving up of a man's own action. The cases relied on by the appellant only prove, that while a rule of reference is depending, a cause cannot be proceeded on in court; and, that when arbitrators have been rightly appointed, their award is irreversible, except by appeal. He cited *Thompson v. White*, 4 Serg. & Rawle, 141; 1 Tidd. Pr. 628; *Jac. Law Dict. verb. Discontinuance*; *Renner v. Marshal*, 1 Wheaton, 215.

SMITH, J., (after shortly stating the facts,) delivered the opinion of the court.

I consider the discontinuance of this suit, on the 28th day of July, 1818, by Charles Snider, irregular and void. The authority to discontinue, was to Obed Fahnestock, personally, and ought to have been strictly pursued. Charles Snider had no authority from the bank to discontinue their suit, or move in the action; he, in fact, in this respect, was a stranger to the bank; and at the time he recorded or entered the discontinuance, had nothing before him, showing any authority to him for doing so. If so, his act was void, and could not operate as a discontinuance of the suit.

The right of a party to discontinue his suit under proper restrictions is not denied; indeed, generally speaking, it is the

[The Mechanics' Bank of the city and county of Philadelphia v. Fisher.]

right of the party, but is not always a matter of course, for the plaintiff will not be permitted to discontinue where he will gain an advantage by it; nor will he be indulged in doing so, if prejudicial to his opponent, or when leading to vexation or oppression.

In England, in the King's Bench and Common Pleas, it is generally done by obtaining a side bar rule "for leave to discontinue the action upon the payment of costs." But from the case of *Belchier v. Gansell*, reported in 4 Burr. 2502, not cited at the bar, it is clear that the rule to discontinue will not be granted if it be intended to oppress the defendant by another suit. To me, it appears the case of *Belchier v. Gansell*, if not exactly the same as the one before us, is very analogous to it. In that case, a discontinuance had been entered on a side bar rule, and then the plaintiff arrested the defendant again on the very same bonds, only laying the new suit in Middlesex instead of London; but on motion, the discontinuance was set aside on the ground that it was a trick, and an unwarrantable conduct in the attorney, and that it ought not to have the intended effect.

In this country, in our own courts, the law is established in the same way. In *Pollock v. Hall*, 3 Yeates, 42, Chief Justice Shippen says, discontinuances are the acts of the court, and subject to their discretion. And in *Broom v. Fox*, 2 Yeates, [*347] 531, the court say, "Regularly, there can be no discontinuance without leave of the court." In addition to these cases, there are others, which, by a parity of reason, bear on the present case. In *Wikoff v. Perot*, 1 Yeates, 38, and *Jackson v. Winchester*, 2 Yeates, 529, it is decided, that the defendant cannot withdraw his plea, at the time of trial, to give him the benefit of the conclusion to the jury, without the leave of the court; or, wherever trouble or expense has been incurred by any plea of the defendant's, the court will not give leave to retract the plea. So, in *M'Cullough v. M'Cullough*, 1 Binn. 214, after an inquest has returned, that the rents and profits will pay in seven years, the plaintiff cannot discontinue his *feri facias*, and take out a new one, without leave of the court. I take the result of this doctrine to be, that courts will protect their suitors from vexation, oppression, or an undue advantage, and will not suffer either party to do any act which may have this tendency. In this case, the advantage the plaintiffs proposed to themselves, must be obvious to all, for by discontinuing the suit in Dauphin county, where the defendant was at home, and by suing him immediately for the same cause of action in Philadelphia, where the plaintiffs resided, they would, of course, get rid of some inconvenience, expense, and trouble; to all which, the defendant would necessarily be exposed, if com-

390

[The Mechanics' Bank of the city and county of Philadelphia v. Fisher.]

pelled to attend at Philadelphia. I would then ask, was this not a contrivance, or an attempt on the part of the plaintiffs, not only to gain an advantage over their opponent, but was it not also calculated to vex, and oppress, and expose him to unnecessary expense and inconvenience? Whenever, therefore, it appears a party discontinues one suit, for the purpose, merely, of instituting another for the same cause of action elsewhere, the court, on motion, will set aside the discontinuance, and reinstate the former suit, and subject the party to the consequences of his own acts. Here the plaintiffs had chosen the place and the tribunal where, and before which, to sue their debtor; having done so, the defendant, on his part, as he had a right, moved in the suit, and filed his determination of record to have the suit decided by arbitrators, of which, he noticed the plaintiffs; but, before he had returned home from this service, the plaintiffs gave directions to discontinue their suit; it was discontinued by one not authorized, and without the permission of the court. Under these circumstances, I am not disposed to favour the discontinuance of a suit. The rule to arbitrate was not stricken from the record, but remained on the same when the discontinuance was entered. In the case of *Landis v. Bigler*, (I believe not reported,) in which a rule to arbitrate had been taken out, but never acted on, but still remained on record, and the case afterwards tried, and a verdict and judgment rendered for the plaintiff, this court, on error, reversed the judgment, declaring the law to be, that whilst the rule to arbitrate remained, the cause was out of court. If this be so, and the discontinuance of a suit be the act of the court, then there could be no discontinuance in the suit before *us. The arbitrators were afterwards appointed and met, (the bank having been previously duly [*348] notified of the time and place of their meeting,) made an award, and filed the same of record, according to law. The act of assembly, under which these proceedings were had, directs, that the report of the arbitrators shall be entered on the docket of the prothonotary, and from the time of such entry, shall have the effect of a judgment against the party against whom it is made, and be a lien on the party's real estate, until such judgment be reversed on an appeal; and the appeal is to be made within twenty days after the entry of the award. In the case before us, the plaintiffs did not appeal; but on the 8th day of April, 1829, moved the Circuit Court to strike off the rule of reference, and the subsequent proceedings, which motion the court granted. Upon the whole, then, this court is of opinion, that where it appears a discontinuance is entered with a view to vex and oppress a defendant, by suing him elsewhere for the same cause of action, and the party, under such circumstances, ap-

[The Mechanics' Bank of the city and county of Philadelphia v. Fisher.]

plies to the court to sanction the discontinuance of the suit, and set aside all subsequent proceedings in the cause, the application should not succeed unless founded in justice and equity; and not, as in the present case, where an advantage is the obvious and necessary consequence to the plaintiffs, and great expense, besides inconvenience to the defendant. The judgment is, therefore, to be reversed, and the award to stand.

Judgment reversed.

Cited by Counsel, 3 R. 323; 4 R. 379; 7 W. 496; 2 M. 100; 6 W. & S. 148, 493; 2 Barr, 440; 7 H. 58; 32 S. 306.

Cited by the Court, 1 M. 90, 158; and commented on and explained in, 10 W. 133.

[*349]

*[LANCASTER, JUNE 1, 1829.]

Geiger *against* Welsh and Others.

IN ERROR.

It is the duty of the court to answer fully the points upon which they are requested by counsel to charge the jury. But it is not necessary that they should answer the propositions submitted, in the very words of the propositions. It is enough if the answer be sufficiently full to be understood.

Nor is it necessary, where the same proposition is repeated, though in different words, to answer every repetition of it. One full answer is enough.

To the following propositions:—1. That a conveyance, made with a view to defeat creditors, is fraudulent and void; 2. That a debtor cannot give his property to his children to the injury of his creditor; 3. That a debtor cannot provide for the maintenance of himself and his wife out of his property to the injury of his creditors; and every instrument of writing, or conveyance, for such purpose, is void as to creditors; 4. That if the jury were of opinion, that the debtor had conveyed his property to his children for the purpose of preventing his creditors from levying upon it, the conveyance is fraudulent and void as to creditors; 5. That if the conveyance of the debtor to his children was, in the opinion of the jury, for the purpose of preventing his creditors from levying on the premises, the plaintiff (who was a purchaser under a judgment against the debtor, and brought ejectment to recover the premises), was entitled to recovery in this suit—it is not sufficient to answer, "That no act whatever, done to defraud a creditor, or creditors, shall be of any effect against such creditor or creditors."

If a deed be made by a parent to his children, on condition, that the grantee shall support the grantor for life, the consideration is a good and honest one between the parties themselves; but, if it be made with a view to hinder or defeat creditors, it is fraudulent and void as respects them.

WRIT of error to the Court of Common Pleas of *Berks* county.

This was an action of ejectment for two pieces of land in Union township, Berks county, brought to January Term, 1827, by the plaintiff in error against the defendants in error.

[Geiger v. Welsh and others]

On the trial of the cause, the case was briefly this :—In 1799, a judgment was claimed against Morgan Lewis, under whom both parties claimed. A *fieri facias* issued on the judgment to April Term, 1799, and an *alias venditioni exponas* to January Term, 1800, and no further proceedings were had on the judgment until the year 1823. On the 16th day of September, 1818, a small house and twenty acres of land were devised to Morgan Lewis, for and during his natural life; and from, and immediately after his death, to his children, share and share alike. On the 23d of March, 1821, the debtor, Morgan Lewis, conveyed and released his life estate to his children, on condition, that they should support him and his wife during their lives. The children took possession of the estate. An *alias fieri facias post venditioni exponas* issued to August Term, 1823, for the residue of the debt, when an affidavit of defence was made; the judgment entered in 1799 opened; the cause referred, and in the year 1826, a report, or award, for the [*350] plaintiff, made for one hundred and seventy-two dollars, and judgment entered thereon. On a *venditioni exponas* to August Term, 1826, the property was sold to Jacob Geiger, the plaintiff, who, on the 14th day of August, 1826, received the sheriff's deed for the same, on which this ejectment was brought. On the trial, it was principally contended, that the deed of 1821, was fraudulent and void, as the grantor was indebted at the time, and this his only property.

At the close of the trial, the counsel for the plaintiff requested the court to charge the jury as follows :—

“1. That a conveyance, made with a view to defraud creditors, is fraudulent and void.

“2. That a debtor cannot give his property to his children to the injury of his creditors.

“3. That a debtor cannot provide for the maintenance of himself and his wife out of his property to the injury of his creditors, and every instrument of writing, or conveyance, for such purpose, is void as to creditors.

“4. That if the jury are of opinion, that Morgan Lewis conveyed his property to his children for the purpose of preventing his creditors from levying upon it, the conveyance is fraudulent and void as to creditors.

“5. That if the conveyance of Morgan Lewis to his children was, in the opinion of the jury, for the purpose of preventing his creditors from levying on the premises, the plaintiff is entitled to recover in this suit.

“6. That Morgan Lewis being indebted on the 23d day of March, 1821, his deed to his children, of that date, given in

[Geiger v. Welsh and others.]

evidence on the trial of this cause, is fraudulent and void as to his creditors."

The court, in their charge, submitted to the jury the facts of the case for their consideration and decision, and to the points of law above stated, answered as follows:—

"To the first, second, third, fourth, and fifth points, the court answered, that no act whatever, done to defraud a creditor or creditors, shall be of any effect against such creditor or creditors."

To the sixth point, the court answered, "That Morgan Lewis being indebted on the 23d day of March, 1821, his deed to his children of that date, is fraudulent and void as to his creditor or creditors, if the jury believe it was given without a good and valuable consideration. The laws of Pennsylvania do not militate against any transaction *bona fide*, and where there is no imagination of fraud.

To this charge, the plaintiff, by his counsel, excepted, and requested the court to file the same, agreeably to the twenty-fifth section of the act of the 24th of February, 1806. The verdict and judgment were for the defendants.

The errors assigned on the record, in this court, were four.

[*351] "1. That the court did not charge the jury on the points insisted upon in the argument of the cause, and material to the issue, although it was respectfully requested so to do by the counsel for the plaintiff.

"2. That the court misdirected the jury as to the law arising from the evidence.

"3. That the court submitted the construction of a written instrument to the jury, instead of giving to it its legal construction, although requested so to do.

"4. That the court erred in stating to the jury, in its charge, that the facts were submitted to the jury for their consideration and decision, when there were no facts in the case disputed, and the verdict, admitting every fact given in evidence to be true, should have been for the plaintiff, according to law."

Biddle, for the plaintiff in error, contended, 1st. That Morgan Lewis being indebted at the time of the execution of the deed to his children of the 23d of March, 1821, and having no other property than was conveyed by that instrument, it was fraudulent and void as against creditors.

2d. That the proposition submitted to the court had not been answered; or if answered, they had been answered erroneously. He supported his argument by citing *M'Allister v. Marshall*, 6

[Geiger v. Welsh and others.]

Binn. 338; Thompson v. Dougherty, 12 Serg. & Rawle, 448; 5 Conn. 67.

H. Smith and *Darling*, for the defendants in error, argued that the judgment given in evidence, was no lien on property acquired after its entry; that it was no lien against the purchasers, and that as the deed in question was made in 1821, the judgment was satisfied, or extinct in law, as against heirs or purchasers; that the sheriff had sold the fee simple, and not the life estate of the debtor; and that, therefore, his deed to the plaintiff was void, and he could not recover under it. They denied that any evidence had been given to show the existence of any debt at the time of the execution of the deed. If Lewis was in debt at all, he was so in 1826, and not in 1821, when the deed was made. The facts that the improvements on the property were made by the children, and that they took possession, are the strongest evidence, that all was done *bona fide*, and without fraud, either in fact or in law.

The points submitted to the court were all substantially and correctly answered. It is not necessary that a judge should answer each point separately. Where one answer is applicable to several points, one is sufficient. They cited *Hublely v. Vanhorne*, 7 Serg. & Rawle, 185; *Brown v. Caldwell*, 10 Serg. & Rawle, 114; *Cope v. Humphreys*, 14 Serg. & Rawle, 15; *Munderbach v. Lutz's Administrators*, 14 Serg. & Rawle, 220.

SMITH, J., (after stating the case,) delivered the opinion of the court.

This court is of opinion, that the judgment of the Court of Common *Pleas must be reversed; and regret that the [*352] points submitted were not fully answered. It is very evident to my mind, that the court, by their answers, intended to answer the points fully, but unfortunately did not do so. It has been declared again and again, and is a well settled principle of law, that a party has a right to ask the opinion of the court on any matter of law, pertinent to the matter before them, and that the withholding of the opinion is error. In this case, the court could have readily, briefly, and separately, answered each point submitted. In regard to the *first* point, an affirmative answer, or one in the words of the proposition, would have been full, complete, and correct. To the *second* point, a repetition of it by the court, affirming the proposition, would have formed a complete and sufficient answer. So in regard to the *third* and *fourth* propositions. I, however, by no means say that it is necessary for the court to answer propositions submitted for their opinion, in the very words of the propositions. It is

[*Geiger v. Welsh and others.*]

enough if the answers be sufficiently full to be understood; nor is it necessary where the same proposition is repeated, though in different words, for the court to answer every repetition of it; one full answer is sufficient; more than one would evidently be improper, having nothing valuable in it, unless the swelling of the record by a repetition of the same answers would be considered so. But the court did not so answer in this case; one answer only was given to all the foregoing points, though they materially differed from each other.

The *fifth* proposition was not so answered as to convey to the understanding of the jury a correct idea of the law. The answer of the court (in fact, the same that was given to all and each of the preceding points), is, "that no act whatever, done to defraud a creditor or creditors, shall be of any effect against such creditor or creditors." Clearly, this is not a sufficient answer to the points here submitted. In the abstract, it is true and correct, that no act whatever, if done to defraud creditors, can be of any effect against creditors. But the party was desirous the court should inform the jury explicitly, that if the conveyance from Morgan Lewis to his children, was for the purpose of preventing his creditors from levying on the premises, the plaintiff would be entitled to recover in this suit. Nothing was said by the court, in their answer, to lead the minds of the jury directly to the consideration of the matter contained in the proposition; nor do the court in their charge, instruct the jury, as I think they ought to have done, that if the conveyance was for the purpose of preventing the creditors of Morgan Lewis from levying on the premises, the plaintiff would be entitled to recover. As to this, the court remained silent, and did not instruct the jury. But to the *sixth* and last point, the court answers, "that Morgan Lewis being indebted, on the 23d day of March, 1821, his deed to his children of that date is fraudulent and void, as to his creditor or creditors; and had the court stopped here, the answer would have been full and correct; but the court went on and [*353] *added, "if the jury believed it was given without a good and valuable consideration;" and in this the court erred, for the deed would have been fraudulent and void as to creditors, if made to his children, even for a valuable consideration. Under certain circumstances, transactions, honest between parties themselves, often become fraudulent in relation to others. So, in this case, if the deed was given to the children, in consideration, or on condition of supporting the grantor for life, which would have been, as to them, a valuable consideration, and honest between the parties themselves, yet, if made with a view to hinder or defeat creditors, it would be fraudulent and void in relation to them. And so the jury should have been

[Geiger v. Welsh and others.]

instructed; but the court told the jury, it was fraudulent and void as to his creditors, if they believed it was given without a good and valuable consideration, which evidently tended to mislead the jury; for they might infer from the direction, that if the consideration was a good and valuable one, the deed was not fraudulent as to creditors, and that a valuable consideration was all that was necessary to make a deed effectual under any circumstances. But so is not the law. I think the court should have instructed the jury, that the facts given in evidence, uncontradicted as they were, amounted to a fraud in law, which the court had the right to decide, and not the jury; here, however, the court referred the decision to the jury. In the opinion of this court, the plaintiff in error has sustained the errors he assigned in the record; and the judgment of the Court of Common Pleas is, therefore, to be reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 3 Penn. R. 162; Bald. 354; 2 Wh. 324; 3 Wh. 410; 4 Wh. 41; 5 Wh. 180; 6 W. & S. 188; 8 W. & S. 431; 2 Barr, 482; 8 Barr, 87, 214; 9 H. 329; 10 H. 181; 3 C. 127; 6 C. 540; 9 C. 234; 1 Wright, 174; 3 Wright, 505; 1 S. 381; 10 S. 435; 15 S. 360; 31 S. 179; 6 W. N. C. 455.

Cited by the Court, 4 H. 497.

[LANCASTER, JUNE 3, 1829.]

Myers and Another, Assignees of Myers, *against* White.

IN ERROR.

The sheriff is not justified in selling, under a *levari facias*, grain growing on the mortgaged premises. And if he does so, the party to whom the grain belongs, may maintain an action of trespass *quare clausum fregit* against the sheriff, though not in actual possession of the land.

Such party is not estopped from contesting the validity of the sale, in consequence of having received from the sheriff the balance in his hands, after payment of the mortgage.

WRIT of error to the District Court for the city and county of Lancaster, in which the plaintiffs in error, David Myers and Henry Myers, assignees of Peter Myers, brought an action of trespass, *vi et armis quare clausum fregit*, against the defendant in error, William White, Esq., high sheriff of the county of Lancaster.

*From the record it appeared, that Peter Myers, the assignor, on the 1st of April, 1822, executed a mortgage [*354] to Jacob Graybill and Jacob Johns, to secure the payment of 4,500 dollars, which was recorded on the 10th of the same

[Myers and another, Assignees of Myers, v. White.]

month. No proceeding was had upon it until the 8th of January, 1825, when a *scire facias* was issued, to which defence was taken; and on the 21st of March, 1825, an award of arbitrators was entered in favour of the plaintiffs. No appeal having been entered, a *scire facias* issued on the 19th of April, 1825, returnable to August Term, by virtue of which, the mortgaged premises were sold on the 18th of May, 1825. In the meantime, viz., on the 15th of January, 1825, Peter Myers assigned all his property, real, personal, and mixed, for the benefit of all his creditors, except Graybill and Johns, the mortgagees. The trust was accepted by the assignees, and the assignment recorded on the day of its date. Upon the *levari facias*, issued by the mortgagees, their counsel indorsed a direction to the sheriff "to levy and sell the mortgaged premises, together with the grain growing thereon." Upon the day of sale, the assignees were present on the premises, and gave public written notice of the assignment; in which they stated, that they had let the plantation, &c., assigned to them for the term of one year from the 1st of April, then last past, for rent taken in advance, and claimed to hold the said rent, and also, the grain in the ground, as personal estate, agreeably to the true intent and meaning of the said deed. Notwithstanding this notice, the sheriff, who was indemnified, sold the grain with the mortgaged premises, and for this injury the present action was brought. One of the plaintiffs, as assignee of Peter Myers, received the balance which remained in the sheriff's hands, after payment of the mortgage.

On the trial, seven legal propositions were submitted to the court for their opinion, by the counsel for the plaintiffs, and nine by the counsel for the defendant, all of which, however, may be resolved into three questions.

1. Whether or not, the sheriff was justified by his writ, in selling the grain growing on the mortgaged premises?

2. Whether or not, the plaintiffs were estopped from contesting the validity of the sale, in consequence of one of them having received from the sheriff the balance of the money in his hands?

3. Whether or not, an action of trespass *quare clausum fregit*, could be maintained by the plaintiffs against the sheriff, upon the facts proved in this case?

Under the direction of the court, the jury returned a verdict for the defendant, and judgment having been rendered upon it, the plaintiffs removed the record by writ of error.

Montgomery and Jenkins, for the plaintiffs in error, cited *Ruston v. Ruston*, 2 Yeates, 67; *Wharf v. Howell*, 5 Binn 504;

[Myers and another, Assignees of Myers, v. White.]

M'Call v. Lenox, 9 Serg. & Rawle, 309; North v. Turner, 9 Serg. & Rawle, 244.

**W. Hopkins, contra*, cited, 1 Chitty Pl. 174; Vanhorne v. Frick, 6 Serg. & Rawle, 90; Willing v. Brown, [*355] 7 Serg. & Rawle, 467; M'Call v. Lenox, 9 Serg. & Rawle, 311, 314; 2 Johns. Ch. Rep. 442; Patterson v. Swan, 9 Serg. & Rawle, 16; Floyd v. Browne, ante, page *121; Powel on Mort. Ch. 4, page 80; 17 Mass. Rep. 299; 15 Mass. Rep. 280; 13 Mass. Rep. 229; 11 Mass. Rep. 125; Id. 30; 1 Doug. 81, 82; Lyle v. Ducomb, 5 Binn. 592; Smith v. Shuler, 12 Serg. & Rawle, 242; 3 Mass. Rep. 138.

The opinion of the court was delivered by

ROGERS, J.—Peter Myers, on the 1st day of April, 1822, mortgaged a tract of land to Johns and Graybill, who, on the 8th of January, 1825, sued out a *scire facias* on the mortgage. On the 15th of January, 1825, Myers and wife assigned the mortgaged premises to David and Henry Myers, the plaintiffs. At the time of the assignment, there was a crop in the ground, which passed to the assignees. The assignees leased the property to Peter Myers, reserving, as I understand, the crop which was levied on by the sheriff. The mortgagees having obtained judgment on the *scire facias*, issued a *levari facias* to the August Term, 1825, on which was this indorsement: "Sheriff will levy the mortgaged premises, together with the grain growing thereon." The principal point in the cause is, Whether the sheriff be justified by his writ, for the levy and sale of the grain growing on the mortgaged premises. It is contended, by the counsel for the defendant in error, that all leases, or other interests in lands, made or conveyed by the mortgagor subsequent to the mortgage, though before forfeiture, are void against the mortgagee: That as to him, the tenants under such leases, or persons claiming such interests, may be considered as trespassers, disseisors, and wrong-doers: That the mortgagee on notice, becomes entitled to the rent of the premises mortgaged (if let), from the time of executing the conveyance; for the rents and profits are liable to the debt, as well as the premises themselves. And this without doubt, is the law of England, and results from the well-settled principle, that the estate of the mortgagee, until forfeiture, still continues as at common law before the interference of the Courts of Equity. The mortgagee is entitled to an estate in the land as tenant in mortgage, in fee, or for a term of years, as the case may be. There has been an essential departure from the law of England in Pennsylvania, for the mortgagee has no estate, property, or interest

[Myers and another, Assignees of Myers, v. White.]

in the land, until he takes possession of the property. (Vide Rieckert and Reed v. Madeira, ruled at this term.*) Nor has it, as I believe, ever been understood that such a privity exists, as that a mortgagee can compel the tenant of the mortgagor to pay him the rent, whether the lease was executed either before or after the mortgage. Nor has it heretofore been considered, [*356] that as *to the mortgagee, the tenants under leases from the mortgagor, fairly and *bona fide* made, can be treated as trespassers. In Pennsylvania, a mortgage, as has been held in repeated decisions, although in form an absolute conveyance, is in substance but the security for a debt. The mortgagor is the owner of the land, with the same power over it as any other tenant in fee, with incumbrances, or liens, upon the property. In this case, the mortgagees have treated it as a pledge for the debt, by proceeding under the act of assembly, directing the sale of the mortgaged premises. This is a proceeding *in rem*, it is true, and must necessarily be so, where the remedy is on the mortgage itself, and not on the bond, which, for greater security, and as giving a more extensive remedy, is usually taken. In deciding the question, I throw out of view the indorsement on the writ, for that cannot enlarge the power of the sheriff. He must rest his defence on the writ itself; and in that, he is commanded to sell the premises mortgaged, without any authority whatever to dispose of the grain. As there is no difference in this respect between a judgment and mortgage creditor, this case has been virtually decided in *Hambach v. Yeates*, not yet reported, in which it was held, that grain growing in the ground, is personal property, and might be levied on and sold as such; and that it did not pass by a sale to the sheriff's vendee. Peter Myers, before judgment on the *seire facias*, had parted with his interest in the crop. At the time of the sale, all his right was vested in his assignees for the benefit of his creditors.

When this cause was first broken, I was of opinion, with the counsel for the defendant in error, that the action had been misconceived; but upon further investigation, as the assignees had reserved the right to the crop, I cannot distinguish this in principle, from *Stultz v. Diekey*, 5 Binn. 285. A tenant entitled to the waygoing crop, who enters and warns a third person against cutting it, may maintain trespass *quare clausum fregit*, against a wrong-doer, notwithstanding he had, previously to the trespass, given up to his landlord possession of the farm, in a part of which the crop was growing.

It has also been contended, that inasmuch as Henry Myers,

* Ante, page *325.

[Myers and another, Assignees of Myers, v. White.]

one of the plaintiffs, received the balance of the money, the assignees are estopped from contesting the validity of the sale. In this I cannot perceive any inconsistency. It was the balance of the money after the payment of the mortgage, to which Johns and Graybill pretended to have no right, nor had the sheriff any claim. It undoubtedly belonged to the assignees, and the receipt indicates no intention to legalize the illegal seizure of the grain. In order to amount to an estoppel, it should be inconsistent with the action, which in the opinion of the court, it was not. Its effect will be, to lessen the damages, if any shall be recovered on another trial of the cause.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 3 Penn. R. 500; 3 Wh. 463; 2 W. & S. 269; 4 H. 180; 9 C. 257; 2 S. 360; 22 S. 459; 7 O. 519; 11 W. N. C. 68.

Cited by the Court, 1 Penn. R. 473; 3 W. 406; 1 H. 278; 4 H. 178; 3 C. 510; 5 C. 68; 9 N. 219; 7 O. 520; s. c. 13 W. N. C. 430.

Mr. Justice LOWRIE, in *Bittinger v. Baker*, 5 C. 68, declares this case to be unsound. In *Hershey v. Metzgar*, 9 N. 219, the remark of Mr. Justice LOWRIE was characterized a *dictum* and the principal case distinguished from those supposed to be in conflict with it. It was there said that the test is whether there has been a severance of the growing grain. The question again came up in *Long v. Seavers*, 7 O. 520; s. c. 13 W. N. C. 428, and was decided under the test just given. The numerous and contradictory authorities are discussed at some length in *Reed on the Statute of Frauds*, § 708 and note n.

*[LANCASTER, JUNE 3, 1829.]

[*357]

M'Lenachan and Wife, Administrators of Bucher,
against the Commonwealth, for the use of Bucher.

IN ERROR.

The confirmation of an administration account, like any other decree of the Orphans' Court, cannot be re-examined but by way of review.

But the parties may so modify the balance as to render it necessary to unravel the account, to give effect to their agreement.

A release by the persons beneficially interested to one administrator, of everything but certain parts of the estate in the hands of the other administrator, which are specially excepted, is valid, and is to be carried into effect according to the intention of the parties; and it is competent to the parties interested, to give extrinsic evidence in relation to the parts excepted, notwithstanding the confirmation of the administration account.

WRIT of error to the District Court for the city and county of *Lancaster*, on which the record was returned, accompanied by several bills of exceptions, tendered by the defendants below, who were plaintiffs in error.

[M'Lenachan and Wife, Administrators of Bucher, v. The Commonwealth, for the use of Bucher.]

From the record it appeared, that at June Term, 1824, a judgment was obtained in the name of the Commonwealth *against* James M'Lenachan and Ann, his wife, administrators of Martin Bucher, deceased, on their administration bond. On this judgment a *scire facias* issued for the use of Martin Bucher, the plaintiff, to recover his distributive share of the estate of Martin Bucher, the intestate. At the same time, similar writs issued for the use of Mary and Christian Bucher, who sued by their guardians, and of William Ralston, administrator of Elizabeth Bucher, deceased.

When the cause was called up for trial, and before the jury was sworn, the defendants moved to amend their pleadings, by adding the plea of a release, which was drawn up at large, and filed. The plaintiff objected to the plea being received, but the court overruled the objection. To this plea the plaintiff replied, that there was no release which released the plaintiff's cause of action in this suit; and further, that the supposed release was obtained by fraud, misrepresentation, and undue influence.

On the trial, the plaintiff offered to prove what articles of personal property, belonging to the intestate, had come into the hands of Mrs. M'Lenachan. The defendants objected to the evidence, and in support of their objection, produced the administration account of John Good and Ann Bucher, (now Ann M'Lenachan,) administrators of Martin Bucher, deceased, passed in the Orphans' Court on the 31st of May, 1819. But the court admitted the evidence offered by the plaintiff, and, at the request of the defendants' counsel, sealed a bill of exceptions.

[*358] *The plaintiff having given the evidence stated above, the defendants gave in evidence a release, bearing date the 19th of September, 1825, from Martin Bucher (the plaintiff,) and others, to John Good, in which they acknowledged to have respectively received from him, as acting administrator of the estate of Martin Bucher, deceased, the several sums of money therein specified, in full of their several and respective shares of the estate of the intestate, "Agreeably to the supplementary account of the said John Good, as acting administrator of the said intestate's estates, this day filed of record in the office of the register of wills, &c., in and for the said county of Lancaster, and advertised for presentation to the Orphans' Court of the said county, on the third Monday in December next, and all claims and demands of what nature or kind soever, the same may be by us, or either of us, against him, the said John Good, for, or on account of the estate, real and personal, or the proceeds of the

[M'Lenachan and Wife, Administrators of Bucher, v. The Commonwealth, for the use of Bucher.]

estate, real and personal, of the said Martin Bucher, deceased, or any part thereof, save and excepting, and always reserving our several and respective parts, shares, and proportions of the amount of rents due by James M'Lenachan, and Ann, his wife, late Ann Bucher, widow and relict of the said Martin Bucher, deceased, for a certain farm in Dunmore township aforesaid, late part of the real estate of the said intestate, and purchased by him at public sale from the administrators of the said decedent's estate. Also, excepting and reserving our respective shares in the amount of a distillery, purchased by the said James M'Lenachan, and Ann, his wife, or one of them, or kept by her at the appraised value, the amount of which is credited in the former account settled on the said decedent's estate: and also, excepting and reserving our distributive shares in the balance of the purchase-money of said farm, purchased by the said James M'Lenachan, which claims are not hereby released; and, therefore, we do hereby acquit, exonerate, release, and forever discharge the said John Good, his heirs, executors and administrators of, and from all actions, suits, claims, and demands whatsoever, for, or on account of the estate of the said Martin Bucher, deceased, or any part thereof; and hereby agree to make no objections to the passing of said supplementary account before the Orphans' Court of said county, being fully satisfied and content therewith." The defendants also gave in evidence the administration account of John Good and Ann Bucher, passed in the Orphans' Court on the 31st of May, 1819, and the supplemental account referred to in the release. After the evidence thus given by the defendants, the plaintiff offered to prove, that the articles called in the inventory the distillery, came into the hands of Ann Bucher, the defendant. The evidence was objected to by the defendants' counsel, but the court permitted it to be given, and sealed another bill of exceptions.

*The plaintiff afterwards offered to prove by George Koons, that the sum of one hundred and eighty-one dollars, credited as paid to him in the administration account of John Good and Ann Bucher, allowed by the Orphans' Court on the 31st of May, 1819, never had been paid to him. This evidence was likewise objected to by the counsel for the defendants, but admitted by the court, who sealed a third bill of exceptions.

The defendants then offered in evidence the account of James M'Lenachan, and Ann, his wife, for the maintenance, &c., of the minor children of Martin Bucher, deceased, which had been allowed by the Orphans' Court of Lancaster county after notice and full hearing of the guardians of said children. The evidence

[M'Lenachan and Wife, Administrators of Bucher, v. The Commonwealth, for the use of Bucher.]

being objected to by the plaintiff's counsel, the court rejected it, upon which a fourth exception was taken.

After the evidence stated in the four preceding bills of exceptions had been given, and after George Koons had testified, that Martin Bucher was not indebted to him at the time of his death; that he did not know that he ever got any money from the administrators; that Bucher paid him about a year before his death, and had given other evidence not material; and after the defendants had read in evidence a receipt, dated the 4th of April, 1815, given to Ann Bucher, one of the administrators of Martin Bucher, deceased, and signed by the said George Koons, for one hundred and eighty-one dollars, the plaintiff offered to prove by George Koons, that he could not read English, and that he lived several years with Ann Bucher after her husband's death, for which he was entitled to pay. To the admission of this evidence the defendants' counsel objected, but the court overruled the objection, and this was the ground of the fifth bill of exceptions.

The evidence of both sides being closed, the following points were submitted to the court, on which they were requested to charge the jury.

The plaintiff's points:—

"1. That the writing produced by the defendants, dated the 19th of September, 1825, purporting to be a release, is not a full release; nor does it bar the plaintiff's right to recover his distributive share of, and in the value of two stills, hogsheads, tubs, &c., appraised in the inventory at three hundred dollars, nor does it support the plea of a release.

"2. That Ann M'Lenachan, formerly Ann Bucher, having retained in her possession the said two stills, hogsheads, tubs, &c., and used the same for some years, is bound to answer to the distributees the whole amount at which the same were appraised in the inventory.

"3. That the affirmation of John Good and Ann Bucher is no evidence of the payment of one hundred and eighty-one [*360] dollars to *George Koons, which is introduced into the first administration account."

The defendants' points:—

"1. That the only inquiry in these suits is, respecting the personal property of the deceased, and the jury cannot enter into any inquiry relative to the real estate, or the rents of the real estate.

"2. That the release pleaded, operates as a complete bar to the further maintenance of these actions; and the verdict must, therefore, be for the defendants."

[M'Lenachan and Wife, Administrators of Bucher, v. The Commonwealth, for the use of Bucher.]

The charge of the court to the foregoing points was as follows :—

“The court answers the first point of the defendants in the affirmative. In answer to the first point of the plaintiff, and the second point of the defendants, the court say, that the releases given in evidence in these cases, if fairly obtained, are a release and discharge in law, of the defendants from all demands on the part of the plaintiffs for any part of the personal estate, except the articles called in the appraisement, and in the release, the distillery; which are expressly exempted out of the operation of the release. It is the opinion of the court, that the exceptions contained in the releases, are exceptions out of the releasing covenants, and that they do not discharge the defendants from any suit for any matter contained in the said saving and excepting clause. In answer to the plaintiff's second point, the court say, that the inventory filed by the defendant and her co-administrator, John Good, is very high and satisfactory evidence, that all the goods mentioned therein, came to the hands of the administrators, and that the valuation set upon them is a fair and just one. But the court will not say, that the inventory is absolute, conclusive, and incontestable evidence of the value of the property. If the jury believe the evidence, and are of opinion that the defendant has not already accounted for the value of the articles mentioned, called the distillery, she is bound to answer for it now to the several plaintiffs in these causes, according to their several distributive shares thereof.”

To this charge the counsel for the defendants excepted.

Champneys, for the plaintiff in error, cited, 3 Stark. 1751; *Dasher v. Leinaweaver*, 3 Serg. & Rawle, 200; Archb. Pl. 353, 354; Doug. 106; 1 Salk. 178; 6 Johns. 248.

Hopkins, for the defendants in error, cited, *Marriot v. Davey*, 1 Dall. 164; *Kohr v. Fedderhaff*, 4 Serg. & Rawle, 248; 6 Johns. Ch. Rep. 242.

The opinion of the court was delivered by

GIBSON, C. J.—In *M'Fadden v. Geddis*, decided at the last term at this place, it was determined, against the current of the former decisions, that the confirmation of an administration account is conclusive on the parties in an action at law; and although I felt *myself bound by the authorities to dis- [*361]
sent, I should be sorry to see the decision disturbed

[*M'Lenachan and Wife, Administrators of Bucher, v. The Commonwealth, for the use of Bucher.*]

now, even if it were wrong on principle, which I do not admit. I take it, therefore, to be settled, that the confirmation of an administration account, like any other decree of the Orphans' Court, cannot be re-examined but by way of review. But may not the parties so modify the balance as to render it necessary to unravel the account, to give effect to their agreement? Here the persons beneficially entitled, had executed to one administrator, a release of everything but certain items, or constituent parts of the estate, which were in the hands of the other administrator, and these were specially excepted. Now, such a release is valid for the same reason that a release of part of a verdict or judgment is valid. If then, it be competent to those who have released their interest in part of an estate, to reserve the benefit of what may be decreed to them in respect of the rest, it must also be competent to them to show, by extrinsic evidence, what those parts were. Here it was not proposed to open the decree, or vary the balance, but to show what part of the balance had not been released; and this was in no respect inconsistent with the conclusiveness of the account.

The release, in general terms, exonerated the defendants' co-administrator from "all actions, claims, and demands whatever, for, or on account of the estate of the said Martin Bucher, or any part thereof; and hence, it is contended, that the administrators being jointly and severally bound, the bond is discharged as to both. At law, the release of one joint and several obligor, undoubtedly discharges all; but equity restrains all general and sweeping expressions which are inconsistent with the actual intention. Of this, *Kirby v. Taylor*, 6 Johns. Ch. 242, is a remarkable instance, which, in its circumstances, bear some resemblance to the case at bar. There it was held, that the release of one of three guardians, reserving the responsibility of a surety in the guardianship bond, did not discharge the surety as to the others. Now what was the intention here? Clearly, as regards particular parts of the estate, to reserve the liability of the releasee himself. Why insert an express reservation of the defendant's liability in a deed to which he is not a party, and the operative words of which, do not extend to him? The instrument was evidently drawn by a layman; and had the parties known of the rule by which the release of one obligor discharges the other, they would also have known that no reservation of theirs could frustrate it. The intention undoubtedly was, notwithstanding the sweeping words in conclusion, to reserve the excepted parts of the estate entirely from

[M'Lenachan and Wife, Administrators of Bucher, v. The Commonwealth, for the use of Bucher.]

the release; and that being clear, neither the defendant nor the other administrator, was discharged.

Judgment affirmed.

Cited by Counsel, 2 Penn. R. 522; 1 Wh. 344; 10 W. 300; 4 W. & S. 425; 6 W. & S. 195; 4 Wr. 308; 12 Wr. 173; 20 S. 433; 3 O. 128; s.c. 11 W. N. C. 555.

Cited by the Court, 4 R. 176; 2 W. 261; 8 Barr, 268; 10 Barr, 242; 20 S. 428.

*[LANCASTER, JUNE 3, 1829.]

[*362]

Reitenbach *against* Reitenbach.

IN ERROR.

Where the question was upon the validity of a judgment entered under warrant of attorney, upon a bond given by a father to his son, soon after the son became of age, and when the father was about to become insolvent, the alleged consideration of which was, services rendered by the son to the father: *held*, that it was competent to the creditors of the father, on the application of whom the judgment had been opened, for the purpose of letting them into a defence, to show, that on a sale by the sheriff of the father's goods, the son had claimed, and retained as his own property, a number of the articles levied on.

A combination between the father and the son, to defraud the creditors of the father having been proved, *held*, that it was competent to the creditors to give in evidence declarations by the father, in the absence of the son, that the bond was given for the sole purpose of keeping off creditors, and that it was with consideration.

WRIT of error to the Court of Common Pleas of *Lancaster* county.

The trial in the court below was between Daniel Reitenbach, plaintiff, and Peter Reitenbach, defendant. It was to test the validity of a judgment entered on a bond and warrant of attorney, which Peter, when he was about to become insolvent, had given to Daniel his son. This judgment having been opened on the application of Peter's creditors, who carried on the defence in Peter's name, and who alleged fraud between the father and son; they proved by a witness, some declarations by Peter, made in Daniel's presence and hearing, and without any contradiction by Daniel, that the judgment was given to keep the creditors off; that no one could push, and that it would be a scare crow. The creditors next proposed to prove, by the same witness, other declarations by Peter, that the sole purpose of the bond was to keep off creditors, and that it was without consideration. But these declarations not appearing to have been made in the presence of Daniel, and not being proved to have been assented to by him, were, therefore, objected to on the

[Reitenbach v. Reitenbach.]

part of Daniel, and overruled by the court; which formed the ground of the first bill of exceptions. 2. The creditors then offered to prove, that on a sale by the sheriff of the goods of Peter, the father, Daniel, the son, claimed, and retained as his own property, a number of articles which had been levied on. This was objected to, and overruled by the court, and a second bill of exceptions thereupon taken.

J. Hopkins, for the plaintiff in error, admitted the rule of law, that fraud is not to be presumed. But a part of the rule is, that fraud may be inferred from circumstances; otherwise, this sort of knavish combination can never be reached. A boy, half a [*363] year *above age, takes a judgment bond of four hundred and sixty dollars from an insolvent father. This is charged to be a mere scheme and pretext for the benefit of the father. It was used solely for his benefit. His confessions are offered in evidence. Witnesses, who were actually present at the contrivance, can hardly be produced. It may be easily seen how intolerable in practice, a rule must be, that the son, in cases like this, shall not be affected by the declarations of the father, under the pretence that he claims not under, but adversely to the father, when the knowledge of the fraud, and of the whole object of the combination had been proved against him. The principle of law which I submit to the court is, that in civil cases, and even in criminal cases, the declarations of one of the contrivers and partners, is evidence against another, to whom the participation in the fraud has been brought home by previous evidence. 1 Phil. Ev. 76; Coxe's N. J. Rep. 13; *Dostwich v. Lewis*, 1 Day, 33; *Collins v. The Commonwealth*, 3 Serg. & Rawle, 220; *M'Nally's Ev.* 611; *Meade v. M'Dowell*, 5 Binn. 195.

2. On the second exception, the proof was material to show, that over and above the four hundred and sixty dollars, Daniel, the son, pretended to have earned by his short services to his father, sundry articles of personal property in his father's possession. It is said, that this error, if error it was, was cured by the same evidence being afterwards given on the trial. That fact is not admitted. At any rate it does not appear upon the record. Admit even the fact to be so; yet the court did not change their opinion. And evidence creeping into a cause accidentally against the declared judgment of the court, can have no weight with the jury.

Norris, for the defendant in error, protested against applying the rules of evidence in high treason and conspiracy, against the obligee in a bond. This very question has been expressly

[Reitenbach v. Reitenbach.]

decided in *Wolf v. Carothers*, 3 Serg. & Rawle, 240. All the judges in that case gave separate and unanimous opinions, that the obligee is not to be affected by the confessions of the obligor. He shall not exonerate himself by his own declarations. No principle can be more obvious. *Peake's Ev.* 16; *Whiting v. Johnson*, 11 Serg. & Rawle, 328.

2. To the second point, a conclusive answer is, that the evidence excluded, was afterwards given in full upon the trial. *Wolverton v. The Commonwealth*, 7 Serg. & Rawle, 273; *Brown v. Downing*, 4 Serg. & Rawle, 498; *Preston v. Harvey*, 2 Hen. & Munf. 55; *Allen v. Rostain*, 11 Serg. & Rawle, 362, 373.

The opinion of the court was delivered by

SMITH, J.—This suit originated by the entry of a judgment by Daniel Reitenbach against Peter Reitenbach, on a warrant of attorney, on the 7th of October, 1822, in the Court of Common Pleas of Lancaster county to August Term, 1822, No. 293. On the 8th of October, 1822, a *feri facias* issued. On the 18th of December, *1823, William Brinton, Jr., a judgment creditor of Peter Reitenbach, on an affidavit filed, ob- [*364] tained a rule to show cause why the creditors of the said Peter Reitenbach, the defendant, should not be let into a defence, and why all proceedings on the execution should not be stayed. This rule was made absolute, and the cause being put to issue, came on to be tried, when a verdict and judgment were rendered in favour of the plaintiff, Daniel Reitenbach. In the course of this trial, several bills of exceptions were taken, of which two only are offered to the attention of this court.

The paper-book furnished by the plaintiff, Daniel Reitenbach, is very diffusive, and exhibits the cause in its whole progress upon the trial. As the two bills of exceptions neither embody, nor refer to this mass of matter, it could not correctly enter into the discussion of the subjects contained in the bills of exceptions, nor into the deliberations of the court upon them. A bill of exceptions is given by the statute to bring matters of importance, which occur in the course of a trial, on the face of the record, which would otherwise not be found there, so as to secure a review of them by a superior court, if either party should find himself aggrieved by the decision of the inferior court upon them. In its nature, it therefore, is not designed to draw into question, all the occurrences of the trial, but that matter alone which it embraces; and which ought to be set forth with clearness and precision. The rejection or admission of evidence, or testimony, or legal questions raised on facts admitted, are the appropriate objects of it; in the decision of which either party

[Reitenbach v. Reitenbach.]

thinks himself injured. See 1 Bac. Ab. 528 ; 3 Johns. 558 ; 5 Johns. 467, and 8 Johns. 507. These two bills before the court, exhibit all the testimony necessary to give a correct view of the offer, and found upon that testimony the right of the creditor to introduce other testimony which he offered to the court, and in which he was overruled. This alone we have authority to examine, and, therefore, we cannot do, as the counsel of the defendant in error pressed us to do, take an excursion with him through the whole of this voluminous book. Counsel would save themselves much labour, trouble, and expense, and greatly economize the time of this court, so precious to themselves and their clients, as well as to the court, if they would in taking their bills of exceptions, exclude everything from them, which is not essentially necessary to raise the question of law that is to be discussed and decided ; and to present that, in a clear and concise form. This observation is made from an ardent wish to correct a very vicious and unfortunate practice which prevails in taking bills of exceptions ; by which, matter altogether useless and testimony entirely foreign to the point, designed to be raised, is forced into them, to the great labour, expense, and trouble of the profession ; to the great inconvenience and drudgery of the trying courts in settling the bills ; and to the great annoyance of the supervising courts, in searching through a paper-book, swelled into a pamphlet, to find out the matter [*365] which they are to *determine. A reformation in this respect would greatly save the time of the court for the use of suiters, benefit the profession, and relieve the court from a great deal of useless drudgery.

I will now approach the bills of exceptions themselves : and, from the first bill relied on, it appears, that the creditor offered to prove, that on the sale of Peter Reitenbach's property by the sheriff, Daniel Reitenbach claimed, and retained a number of articles, which had been levied on. This, on an objection by the plaintiff, the court overruled, and would not permit the creditors to give in evidence. Now, to me, it is exceedingly clear, this evidence should have been received ; it was important, and had a direct bearing on the question before the court ; and that it had so, will, I think, be evident on an attentive consideration and examination of the whole matter. And, in order to arrive at a just conclusion, we must bear in mind, that the bond in question was given by a father to a son, for services and work done, and this, (in the language of the testimony,) after the son had come of age. Those services continued for six months—the bond was for four hundred and sixty dollars—a large sum for work and services rendered in so short a period. Under these circumstances, then, the creditor alleged, there was fraud

[Reitenbach v. Reitenbach.]

in the transaction, and the bond given for an amount not due ; and, to prove that this was so, he offered to show, that the son had claimed, nay, retained a number of articles, which had been levied on as the father's property ; that, therefore, the son was paid for his services, and could have had no demand against the father at the time the bond was given. If this was proved, it would be for the jury to say, whether the amount of the bond was just, or how much was due, if anything. This evidence should have been permitted to go to them. But the court below refused the offer, and in the opinion of this court, therein erred.

We are also of the opinion, that the court erred, when they refused to allow the testimony mentioned in the second bill of exceptions. On the trial, the creditor had given strong evidence to show, that Daniel Reitenbach and Peter Reitenbach, had entered into a scheme to prevent others, the creditors of Peter Reitenbach, from collecting and obtaining their debts : the giving of this very bond was to be the means of carrying the project into effect ; and, it appeared, that they had not only laid a plan to accomplish their object, but had gone on, and attempted to draw one Jacob Eshelman into their scheme ; in fact, disclosed in part to him, how the creditors would be kept off. The creditor having thus established by proof, a combination between the father and son, to defraud and delay creditors, in order to show the same more completely, proposed to prove, and give in evidence, the declarations of Peter Reitenbach, made in the absence of Daniel Reitenbach ; what he had said before the bond was given, of their intention of giving the bond to Daniel Reitenbach to keep off the creditors, and that it was given without consideration, and for that purpose only. This too, the court *overruled. Now, I take the law [*366] to be, that the declarations of a party, made in regard to such an illegal act, after a combination to do the act has been established or proved, are not only evidence against the party making such declarations, but are evidence also against all others of the combination, who are made equally responsible for the consequences. This is abundantly clear from the authorities cited by the respectable and learned counsel for the creditor, particularly from the case of *Patton v. Freeman et al.* 1 Coxe's N. J. Rep. 13, in which it was decided, that where a combination to perpetrate a fraud was proved, evidence of a conversation with the parties, though all might not have been present during the whole conversation, was good against all. So also, in the case of *Bostwick v. Lewis*, 1 Day, 33. The declarations of Peter Reitenbach ought, therefore, to have been received by the court, and as that was not done, the judgment

[Reitenbach v. Reitenbach.]

must, for this reason also, be reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de nova* awarded.

Cited by Counsel, 3 Wh. 353, 410; 4 Wh. 47, 367; 6 W. 306; 6 W. & S. 510; 3 Barr, 87; 14 Wright, 62; 12 S. 42; 6 N. 412.

Approved and followed, 1 R. 460.

[LANCASTER, JUNE 3, 1829.]

Eberle *against* Mayer.

IN ERROR.

An order, given by an execution creditor to the sheriff, to stay all further proceedings on his execution, at his risk, until further directions is a waiver of his priority, in favour of a second execution, received by the sheriff during the continuance of the stay.

ERROR to Lancaster county.

The cause was argued in this court by *Parke*, for the plaintiff in error, who cited, *Levy v. Wallis*, 4 Dall. 167; *Chancellor v. Phillips*, 4 Dall. 213; *Lewis v. Smith*, 2 Serg. & Rawle, 159; 1 Browne, 367; *United States v. Conyngham*, 4 Dall. 358; 2 Browne, 333; *Cowden v. Brady*, 8 Serg. & Rawle, 510; *Clow v. Woods*, 5 Serg. & Rawle, 280; *Hamilton v. Russell*, 1 Cranch, 316; *Martin v. Mathiot*, 14 Serg. & Rawle, 215; *Whipple v. Foot*, 2 Johns. Rep. 422; *Storm v. Woods*, 11 Johns. Rep. 110; 3 Cowen, 422; 8 Johns. Rep. 16; 17 Johns. Rep. 274.

Ross, contra, cited 2 Yeates, 434; *Perit v. Wallis*, 2 Yeates, 524; *Knox v. Summers*, 4 Yeates, 477; *Water's Executor v. McClellan*, 4 Dall. 208; *Lessee of Hughes v. Dougherty*, 1 Yeates, 497.

The circumstances of the case are fully detailed in the opinion of the court, which was delivered by

[*367] *SMITH, J.—This is a writ of error to the Court of Common Pleas of Lancaster county. The matter came before the court on a feigned issue, directed to try the question, whether an execution, issued by the plaintiff in error, against a certain Jacob Mayer, Jr., was entitled to be first paid out of the money raised by the sheriff, on the sale of the personal property of the said Jacob Mayer, Jr. It was tried on the 22d of January, 1827, and a verdict and judgment rendered for the defendant. On the trial, it appeared, that Jacob Mayer, the

[Eberle v. Mayer.]

defendant in error, on the 9th of June, 1819, had issued a *fiery facias* against Jacob Mayer, Jr., and that on the 17th of July, 1819, a levy was made in consequence of it, on seven head of cattle, two cows, four hogs, twenty-seven dozen sheaves of wheat, also, on rye, hay, and three acres of corn in the ground; to which were added, on the 21st of October, 1819, four acres of rye, and two acres of wheat, then in the ground: That on the 25th of October, 1819, Jacob Mayer, the plaintiff in the above stated execution, but now defendant in error, gave written directions to the sheriff, "to stay all proceedings in the above recited execution, at his risk, until further directions." On the 3d of November, 1819, Ann Eberle, the plaintiff in error, had a *fiery facias* issued against Jacob Mayer, Jr., which was levied, as William Taylor, the deputy sheriff, declares, on eight or nine head of horned cattle, a flock of sheep, eight hogs, and all the property out of doors. The memorandum of this levy, he says, was left in the sheriff's office, and it cannot now be found: That on this same day, he saw a written advertisement put up in a public inn, in the town of Manheim, signed, "Jacob Mayer," for the sale of his personal property on the next day. The sheriff, however, sold the personal property of Jacob Mayer, Jr., on the first *fiery facias*, delivered to him on the 9th of June, 1819. The court, after the sale, granted a rule on Jacob Mayer, the defendant in error, to show cause, why Ann Eberle's execution should not be paid out of the money arising from the sale of this property. This rule was subsequently, on the 25th of September, 1820, argued, and held under advisement by the court, till the 23d of December, 1820, when the court directed an issue to try this question, in which Ann Eberle should be the plaintiff, and Jacob Mayer the defendant. On the trial, the plaintiff submitted to the court the following points, and requested their answers in writing, to wit:

"1. That if the jury believe, from the evidence, that the defendant in the case, by his proceedings, on his judgments and execution against Jacob Mayer, Jr., the delay, and order of stay, at his risk, &c., intended to screen the property of Jacob Mayer, Jr., from his other creditors, the verdict should be for the plaintiff.

"2. That the delay of sale upon Jacob Mayer's execution for upwards of five months, leaving the property with the defendant, without a return of the execution, accompanied by a schedule of the property, and permitting him to use, and eventually to advertise *it for sale as his own, is a fraud in law, and the [*368] verdict must be for the plaintiff, particularly the levy being on household furniture.

"3. That the order of Jacob Mayer, the first execution cred-

[*Eberle v. Mayer.*]

itor, to the sheriff, of the 25th of October, 1819, to stay all proceedings upon his execution at his risk, until further directions, is a waiver of his priority in favour of a subsequent execution, put into the hands of the sheriff during the pendency of the stay. That such order is a legal fraud as to subsequent executions."

The court, in their charge, (and no other answers were given,) stated, that there were two points to be considered in this case: 1st. The operation of the order to suspend; and 2d. The allegation of fraudulent intention in giving it. And the court then added, "We certainly are not warranted in going further than the Supreme Court have gone in the cases heretofore decided by them; but, think that, conformably to these decisions, I should not be authorized to instruct you, that the order of Jacob Mayer, the first execution creditor, to the sheriff, of the 25th of October, 1819, to stay all proceedings upon his execution, at his risk, until further directions, is, of itself, and without more, a waiver of his priority in favour of a subsequent execution, put into the hands of the sheriff during the pendency of the stay, or that such order is a legal fraud as to subsequent executions." To this charge the plaintiff excepted, and he now contends, that it was erroneous, and that the first execution was, in this case, a legal fraud as to the subsequent execution. In order to determine, whether a legal fraud existed in this case, it will be necessary to state what appeared in evidence, and was not contradicted, and is spread on the record under consideration; and in doing so, it is absolutely important to state, and attend to dates. Jacob Mayer, then, on the 5th of June, 1819, entered a judgment on a bond, dated the same day and year, against Jacob Mayer, Jr., conditioned for the payment of one hundred pounds, on the 5th of June, 1820; but two days after, on the 7th of June, 1819, he entered satisfaction on this judgment. On the same 7th of June, 1819, he entered another judgment on another bond, dated the same last mentioned day, conditioned for the payment of one hundred and eighteen pounds fifteen shillings, but payable on demand against the said Jacob Mayer, Jr. From the record, it appears that Ann Eberle had brought a suit against Jacob Mayer, Jr., in which she obtained on the 7th of June, 1819, by an award of arbitrators, a judgment for one hundred and sixteen dollars and twenty-nine cents. Then, on the 8th of June, 1819, the day after Ann Eberle had obtained her award, Jacob Mayer issued an execution on his judgment of the 7th of June, 1819, and delivered the same to the sheriff on the 9th of June, the next day. On the 21st of October, 1819, Jacob Mayer, Jr., called on the sheriff, and requested to know, whether he

[Eberle v. Mayer.]

could not sell his goods himself, when he was told, it was not the legal way of proceeding. Five days after this inquiry, *on the 25th of October, 1819, Jacob Mayer, the plain- [369] tiff, left the order with the sheriff, desiring a stay of proceedings on his execution against Jacob Mayer, Jr., as already stated. On the 3d of November, 1819, Ann Eberle's execution was delivered to the sheriff; and then two days after, on the 5th of November, 1819, Jacob Mayer desired the sheriff to proceed on his execution, and asked the sheriff whether it would not do to go there and sell under the advertisement they had put up. In consequence of these directions, the property was sold, it having been all the time in the possession of Jacob Mayer, Jr. When, therefore, we take an attentive view of all the proceedings and acts of the parties, the conduct of Jacob Mayer must appear irreconcilable with good faith; and I think the court would have been warranted, under the circumstances, in assuming that the only question was, whether the facts given in evidence amounted to a legal fraud, as to the subsequent execution? And that this was for the court to decide. It is true, that merely leaving the property levied on in the possession of the defendant in the execution, though with the plaintiff's consent, is not *per se*, fraudulent, either as to subsequent execution creditors, or purchasers; but, where the plaintiff directs the sheriff, as here, to delay the execution or sale, the law is otherwise.

All the cases cited, (and I have examined them all,) in Yeates' Reports, and in Johnson's and Cowen's Reports, and also the English cases, clearly establish the principle, that where the creditor interferes and directs a delay of sale, and leaves the goods with the debtor in every such case, a second execution coming in will have a preference. I then think that conformably to the decisions on the subject, the court below would have been authorized to instruct the jury, and that it should so have instructed them, that the order of Jacob Mayer, of the 25th of October, 1819, to the sheriff, to stay all further proceedings on his execution, at his risk, until further directions was, of itself, a waiver of his priority, in favour of the second execution, received by the sheriff during the pendency of the stay; in other words, that by the order, the plaintiff's execution must be considered as dormant, and constructively fraudulent as against the subsequent execution. The evidence here, as in the case in 17 Johns. 276, warrants the inference, that the plaintiff issued his *fiery facias*, not with an absolute intention of collecting his debt, but partly at least, with a view to cover the property of the debtor for his use. The

[*Eberle v. Mayer.*]

judgment is therefore reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 3 Penn. R. 489; 5 R. 289; 9 W. 335; 10 W. 439; 3 W. & S. 286; 6 W. & S. 466; 7 W. & S. 66; 8 W. & S. 457; 4 Barr, 155; 2 J. 359; 5 Wright, 276.

Cited by the Court, 4 R. 380; 5 Wh. 153; 7 W. 77, 187; 1 H. 412.

[*370]

*[LANCASTER, JUNE 3, 1829.]

Caldwell *against* Thompson, Executor of Thompson.

IN ERROR.

On an appeal from a justice of the peace, though the form of the suit may be sometimes changed, yet the cause of action must be the same as before the justice.

Where it is alleged that the transcript returned to the Common Pleas, does not conform to the justice's docket, which is alleged to be erroneous, and an application is made for leave to amend the docket by the transcript, the court below are to determine, upon inspection of the docket, and all the papers and evidence before them, what are the true words of the record; and if they refuse the amendment, this court will not for that reason, reverse the judgment.

ERROR to the Court of Common Pleas of *Lancaster* county.*

The plaintiff in error was plaintiff below. The cause came into the Court of Common Pleas on an appeal by the defendant from the judgment of a justice; and the declaration was for goods, chattels and merchandise, sold and delivered. The allegations of error, material to be stated were, 1st. That when the plaintiff offered to prove by John Evans, "That on the 8th of June, 1807, in pursuance of an order from James Caldwell, he delivered to Robert Thompson, the defendant's testator, three hundred bushels of wheat that was stored in his store-house, the property of James Caldwell, the plaintiff, and that the price of wheat was then one dollar and four cents a bushel; and also, that the defendant admitted the plaintiff's account to be correct and right:?" the court overruled the evidence which had been objected to, on the ground that it presented a totally different cause of action from the one decided by the justice. A balance only of forty dollars and interest were claimed to be due on the sale of the wheat.

2d. The plaintiff then offered, in connection with the proposed testimony of John Evans, the docket of the justice, now in the hands of his administrator, to show that the return of the justice upon the transcript is not in conformity with the docket, and

[Caldwell v. Thompson, Executor of Thompson.]

that stating the demand in the said transcript to be for a chair, is a mistake, as no such demand is stated in the docket. And in connection with that evidence, he also offered the affidavits of the plaintiff, and of Boughman, the administrator of the justice, to establish the mistake, and then applied for permission to amend the transcript of the justice by the docket. All these matters were rejected by the court, and bills of exceptions taken thereupon. Among other things, it was alleged by the counsel for the defendant, that the docket entry itself had been altered. The original transcript was as follows:—

*“James Caldwell, Esq., v. Andrew Thompson, Executor of James Thompson, deceased. } Summons, on demand, not exceeding one hundred dollars; debt by book account for a chair, sixty-four dollars and fifty cents. [*371]
The defendant appeared July 27th, 1816. The constable not having notified the plaintiff, continued to July 27th. At 2 o'clock the said day, the plaintiff appeared. On hearing, judgment for the plaintiff for sixty-four dollars and fifty cents, by default, the defendant not appearing, with costs of suit, July 27th, A. D. 1816; justice's fees sixty-two and a half cents, constable's seventy-five cents.”

The justice added to the original transcript as follows:—
“*Mistake*: defendant's testator's name is Robert instead of James, and is so stated on my docket.”

Champneys, for the plaintiff in error, contended, that by the act of 1806, by the law, as it stood before, and all the numerous decisions in this court, the amendment was proper; that, to reject it was error; and that to reject the evidence of Evans was also error. If there was any ground to imagine the docket to have been fraudulently touched, that was a fact in the cause to be decided like other facts by the jury. He referred to Whart. Dig. Amendment, Letter E.; *Zeigler v. Fowler*, 3 Serg. & Rawle, 238; *Clarke v. M'Anulty* 3 Serg. & Rawle, 364; *Bechtol v. Cobaugh*, 10 Serg. & Rawle, 121; *Cochran v. Parker*, 6 Serg. & Rawle, 549.

Parke and *Porter*, *contra*, argued for the defendant in error, that in a case of most apparent erasure, it was correct to withhold from the jury a doubtful, if not fraudulent entry, contrary to the record and transcript in the cause. It was also right not to suffer a hopeless demand for a riding vehicle, called a chair, to be given up, and in lieu of it, an old charge for wheat, to be substituted against the estate of the testator. They cited Moore

[Caldwell v. Thompson, Executor of Thompson.]

v. Wait, 1 Binn. 219; *Owen v. Shelmaher*, 3 Binn. 45; *M'Laughlin v. Parker*, 3 Serg. & Rawle, 144; *Laird v. M'Conachy*, 3 Serg. & Rawle, 290; *Stehley v. Harp*, 5 Serg. & Rawle, 544; *Cassell v. Cooke*, 8 Serg. & Rawle, 268, 287; *Farmers' and Mechanics' Bank v. Israel*, 6 Serg. & Rawle, 293; *Bailey v. Musgrave*, 2 Serg. & Rawle, 219; *Newlin v. Palmer*, 11 Serg. & Rawle, 98.

The opinion of the court was delivered by

TOD, J.—One rule to be deduced from the cases unquestionably is, that on appeal, though the form of the suit may be sometimes changed, yet the substance of the plaintiff's demand, the cause of the action, must be in court identically the same as before the justice. From the decisions, another rule seems equally clear, that the mistakes, the slips of the pen of a justice of the peace, may be, and ought to be corrected. But here, all mistake was denied. It was insisted, there was nothing wrong, except in the docket offered; and, upon this head, divers [*372] matters were alleged on the one side and *on the other. The court were to decide what were the true words of the record. It was not a question for the jury. And the court below having settled it on inspection of the docket and all the papers, and affidavits, ought we to interfere, and upon disputed facts, rather than upon any question of law, to reverse the judgment? I think not. Much must be left to the discretion of the court in which such applications are made. Taking all the evidence as it appears on the record, and the testimony offered from John Evans, and considering that the plaintiff's claim for the wheat was of nine years' standing when he brought his suit before the justice, after the death of the defendant's testator, it is not a case in which, in my opinion, the law calls upon us to disturb any part of the decision of the court below.

Judgment affirmed.

Cited by Counsel, 3 Wh. 422; 4 W. 329; 2 G. 150.

Cited by the Court, 2 W. 15; 4 W. & S. 327; 1 J. 150; 3 Wright, 86.

END OF MAY TERM, 1829.—LANCASTER DISTRICT.

CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

MIDDLE DISTRICT—JUNE TERM, 1829.

[SUNBURY, JUNE 15, 1829.]

Innis and Others *against* Campbell and Others.

APPEAL.

An undisturbed possession of twenty-four years before bringing the action, is sufficient to enable the plaintiff to recover in an ejectment.

The lapse of twenty-four years, though without proof of inquiry, or other circumstances, is sufficient to warrant the presumption of death of a person of whom nothing has been heard for that length of time.

Not having been heard of for seven years, is sufficient to rebut the presumption of life.

An ejectment may be commenced on a strict, legal title, and the plaintiff may rebut a countervailing equity, set up by the defendant, on the trial.

If incumbrances exist, they may be valued and allowed for by the jury.

APPEAL from the Circuit Court, held by Gibson, C. J., in *Mifflin* county.

The original action was an ejectment in the Court of Common Pleas of Mifflin county for a tract of land in Lark township, containing two hundred and five acres, or thereabouts, brought by Alexander Innis and Rebecca, his wife, and James M'Kennan and Margery, his wife, against John Campbell and David W. Huling.

The evidence given on the trial was long, and somewhat complicated. It is sufficient, in order to understand the decision of the court, to state, that the plaintiffs asserted a legal title to

[Innis and others v. Campbell and others.]

the premises, founded partly on a chain of conveyances, and partly on an undisturbed possession of twenty-four years before the action was brought, and of twenty-nine years before the trial. One link in *the chain of title was a deed, dated [*374] August 15th, 1805, from Andrew Wallace and Eleanor, his wife, to James Wallace; the execution of which was certified by the President of the court for the first circuit, Warren county, in the State of Ohio, to have been proved before him by the oaths of the two subscribing witnesses. The certificate was signed by the judge, and a scroll for a seal was annexed.

On the 7th of January, 1814, articles of agreement, under seal, were executed between Thomas Jackson under whom the plaintiffs claimed, and John Cummin, by which the former "bargained and sold" to the latter the land in question, at twenty dollars per acre; the said Cummin to take the land at what the draft calls for, and to pay one-half of the whole amount of the land on the 1st of April following, and to give bond with good security for the payment of the balance, to be paid annually in instalments of four hundred dollars each. The vendor to deliver to the vendee "a clear patent on the 1st day of April, 1815;" on which day the first payment of four hundred dollars was to be made. The first payment was punctually made; the subsequent instalments were not paid, nor tendered, nor were any bonds tendered.

The jury found a verdict for the plaintiffs, to be released on payment of two thousand five hundred and sixty-nine dollars and seventy cents, the full amount of the balance of purchase-money and interest.

A motion for a new trial was made on the part of the defendants, and several points made. The motion was overruled, and the defendants appealed to the Supreme Court; where the cause was argued by *Potter* and *Hale*, for the appellants, and by *Blythe* and *Blanchard*, for the appellees.

The opinion of the court was delivered by

GIBSON, C. J.—My remarks shall be confined to the only part of the case that affords a pretext for an argument. An exception to the admission of Andrew Wallace's deed, was in fact not taken; but, as it was omitted in consequence of a suggestion of the judge, that the defendant would have the benefit of his objection in another way, he ought to have the benefit of it here. The execution of this deed was not proved, and it was undoubtedly inadmissible. But an undisturbed adverse possession of twenty-nine years preceding the trial, and twenty-four preceding the action, was shown to have been in the grantee, or

[Innis and others v. Campbell and others.]

those claiming under him ; and thus, independent of the deed, the plaintiffs had made out a legal title in themselves, and the error in admitting incompetent evidence of what was fully proved by unexceptionable evidence afterwards, became immaterial. Even on a writ of error, where there is no discretion, the admission of incompetent evidence is not a ground of reversal where the fact has been conclusively proved by competent evidence. *Wolverton v. The Commonwealth*, 7 Serg. & Rawle, *273 ; *Preston v. Harvey*, 2 Hen. & Munf. 64. And [*375] we ought, *a fortiori*, to disregard an error, in this respect, on a motion which involves the exercise of discretion, where there is unexceptionable evidence to warrant the verdict.

It is objected, that notwithstanding the effect of the statute of limitation, the want of a conveyance from Wallace and his wife, left the defendant exposed to a demand of her dower, which ought to have been compensated by deducting from the purchase-money a sum equal to the value of the risk. Mrs. Wallace, if living, would undoubtedly have at least an incipient right of dower ; and of her death, there was no other evidence than mere lapse of time. A person, proved to have been alive at a particular time, is presumed to be so still ; and the onus of proof is on him who alleges the contrary. But in addition to lapse of time, proof that he has not been heard of for seven years, is sufficient to rebut the presumption of life ; and, was it shown that Mrs. Wallace had not been heard of for that period, there would clearly be sufficient to warrant a presumption of her death. 2 Stark. Ev. 458. But the question is, whether the lapse of twenty-four years, without proof of inquiry, or other circumstance, be not of itself, sufficient to warrant such a presumption ; and, although I know of no authority in point, I am of opinion that it is. No witness spoke of her age at the execution of the deed, (the period at which we have any account of her,) but under the most favourable circumstances, the chances are unfavourable to the presumption of her having been alive at the time of the trial. If living, she must have attained an age considerably in advance of the average term of human existence. It is said, that rather less than twenty years should be computed, because it is necessary to the plaintiffs' case, that Mrs. Wallace should have been dead at the commencement of the action. But the cause of action did not depend on the absence of incumbrances. It has been erroneously said, that this is an equitable ejectment for a specific performance of the contract of sale. Exactly the reverse. It is founded on a legal title which has not been conveyed ; and it is consequently in disaffirmance of the sale. The consequence intended to be produced is, no

[*Innis and others v. Campbell and others.*]

doubt, payment of the purchase-money ; but that is neither a direct, necessary, nor a natural effect of a recovery. Such ejectments are frequently maintained even in England, where there is no defence at law ; the defendant being relievable only in equity on proof of having paid the purchase-money, or done all that he safely could to entitle him to a conveyance ; and even there, the chancellor will let the law take its course if there be no incumbrance at the hearing. *Cassell v. Cooke*, 8 Serg. & Rawle, 268, was altogether a different case. There, the performance of the plaintiff's covenant to make an unexceptionable title, was a condition precedent to the institution of an action at law ; and it is clear, that there must be a perfect cause of action either in equity or at law at the inception of the suit. *Snider* [*376] *v. Wolfley*, 8 Serg. & Rawle, 328. But an action *may always be commenced on a complete legal title, it being sufficient to obviate a countervailing equity at the trial. *Lessee of Moody v. Vandyke*, 4 Binn. 31. A discretionary power over the costs would, in some cases, be necessary to enable us to maintain the suit, and yet do justice to a defendant who has been vexed by a suit at law, to which, at its inception, he had an available defence in equity. But here there can be no hardship on that ground, as the defendant would be entitled only to have the incumbrance valued and deducted from the purchase-money ; so that the vendor, in any event, would be entitled to costs, as regards the residue. It is sufficient, therefore, that there was evidence of an extinguishment at the trial ; and substantial justice having been done by the verdict, I am of opinion, that the judgment of the Circuit Court be affirmed.

SMITH, J., concurred ; TOD, J., dissenting, and ROGERS, J., and HUSTON, J., not having heard the argument, taking no part in the decision.

Judgment affirmed.

Cited by Counsel, 4 Wh. 166, 174 ; 5 Wh. 34 ; 1 Wh. 228 ; 2 Wh. 463 ; 5 W. & S. 209 ; 10 Barr. 74 ; 11 H. 115 ; 12 H. 141 ; 2 G. 108 ; 3 O. 225.

*[SUNBURY, JUNE 15, 1829.]

[*377]

Seitzinger, Administrator of Strohecker, for the use of
Drinkel, Administrator of Garver, *against* Weaver,
Administrator of Grant.

APPEAL.

The covenants raised by the words grant, bargain, and sell, by force of the act of assembly of the 28th of May, 1715, are not applicable alone to deeds executed, but extend to articles of agreement for the conveyance of land

The words grant, bargain, and sell, do not create a covenant of special warranty, running with the land and broken only by eviction. The act intended to give to the vendee the benefit of two distinct covenants; a covenant of seisin as regards defeasibility from the acts of the vendor, and a covenant for quiet enjoyment against disturbance by the vendor, and those claiming under him; and the covenant of seisin is broken by the existence of an incumbrance created by the vendor, the instant it is sealed and delivered.

The previous sale of part of the land by articles of agreement, is an incumbrance on the legal estate, which renders it defeasible in the hands of the subsequent vendee, who may, therefore, maintain an action to recover back the purchase-money.

Where A. entered into articles of agreement to convey lands to B., who paid a small portion of the purchase-money, after which A. died, without having executed a conveyance, but leaving a will, by which he empowered his executors to sell for the payment of debts and education of children, and B. took no step to have the title completed, but C., B.'s father-in-law, and D. his father, paid the residue of the purchase-money, and received from the executors of A. a conveyance for the land, which they afterwards divided between them: *held*, that a suit could not be maintained upon the covenants created by the words grant, bargain, and sell, in the agreement in the name of B., for the use of C., to recover back part of the purchase-money, in consequence of the existence of an incumbrance previously created by A., by which the title of C. to part of the land was defeated. Nor can B. in such an action, recover back that part of the purchase-money which he has paid to the testator.

The presumption of law is, that the acceptance of a deed in pursuance of articles of agreement, is satisfaction of all previous covenants; and, although there may be cases in which such acceptance is but a part execution of the contract, yet, to rebut the legal presumption, the intention to the contrary must be clear and manifest.

THIS cause was tried before TOD, J., at the Circuit Court of Northumberland county in April, 1828, when a verdict was rendered for the plaintiff. A motion, made on behalf of the defendant for a new trial having been overruled, this appeal was entered.

The action was covenant, brought by Jacob Seitzinger, administrator of Daniel Strohecker, for the use of Daniel Drinkel, administrator of John Garver, against Martin Weaver, administrator *de bonis non, cum testamento annexo*, of Thomas

[Seitzinger, Administrator of Strohecker, for the use of Drinkel, Administrator of Garver, v. Weaver, Administrator of Grant.]

Grant, whose executors had been discharged from their office. The declaration was upon articles of agreement, dated the 26th of April, 1815, by which the said Thomas Grant agreed to sell [*378] to the said *Daniel Strohecker, a certain tract of land, and contained a *profert* of the agreement. The plea was *non est factum*. The instrument having been lost, the plaintiff was permitted on the trial, though opposed by the defendant's counsel, to prove its contents. It appeared, that by the terms of the agreement, five hundred dollars of the purchase-money were to be paid in three weeks from its date; half the residue, in the following October, and the other half on the first of the following April. It contained no covenants except those which might arise from the words "grant, bargain, and sell." On the agreement was the following indorsement:—

"I do agree to convey to D. Strohecker the within described tract of land in fee simple. 13th of May, 1815." Signed Enoch Smith.

Thomas Grant, after having received from Daniel Strohecker four hundred and ninety dollars of the purchase-money, died, without having executed a conveyance. He left a will, by which he empowered his executors to sell his real estate for the payment of his debts and the education of his children. Daniel Strohecker took no measures to have the title perfected; but, on the 14th of June, 1816, the executors of Grant executed a deed, with general warranty for the premises contracted for, to John Garver, the father-in-law, and John Strohecker, the father of Daniel, who paid the residue of the purchase-money. A partition of the land was afterwards made between John Garver and John Strohecker. To April term, 1820, an ejectment was brought by Rebecca Stedman against John Johnson and Daniel Strohecker, to recover a part of the tract above mentioned. It appeared, that on the 15th of March, 1792, William Cook and Thomas Grant had contracted, by articles of agreement, to convey a tract of land to James Stedman; but the evidence did not show in what manner Rebecca's title was connected with this agreement. On the 23d of January, 1822, she had judgment for eighty-nine acres and seventy-nine perches, of which possession was delivered to her on an *habere facias possessionem*. In the meantime, John Garver died, and on the 29th of April, 1820, his heirs conveyed that portion of the land, which in the partition had been allotted to him, and which included the land afterwards recovered by Rebecca Stedman, to George Kremer, who retained part of the purchase-money to await the event of the ejectment brought by Rebecca Stedman.

[Seitzinger, Administrator of Strohecker, for the use of Drinkel, Administrator of Garver, v. Weaver, Administrator of Grant.]

A suit was afterwards commenced by Kremer against the executors of Thomas Grant, in which a judgment was confessed on certain terms of compromise between the parties, in full satisfaction of damages on the warranty.

The following were the reasons filed in the Circuit Court for a new trial :—

“1. Because the court admitted evidence of the existence and loss of the article of agreement declared on, upon the plea *non est factum*, the declaration containing a *proferet*.

“2. Because the court admitted the deed of the executors in evidence, no connection having been shown [*379] before or after the admission, between Daniel Strohecker and the grantees in the said deed.

“3. Because the estate of Thomas Grant could be made liable in no other way upon the agreement, than by proceeding to prove the contract under the act of assembly providing for the proof of contracts made by decedents.

“4. Because the plaintiffs showed no breach of the acts in the articles in the lifetime of Thomas Grant, or afterwards, and did not show any act of Thomas Grant incumbering the estate.”

And because the court erred in their charge to the jury in the following particulars :

“1. In leaving it to the jury to infer, that the eviction of part of the land by Rebecca Stedman, was founded on the agreement between Thomas Grant and James Stedman, the evidence being contrary.

“2. In stating to the jury, that the words ‘grant, bargain, and sell,’ in the articles declared on, were sufficient to sustain this action.

“3. In stating, that the articles of agreement was not merged in the subsequent deed by the executors.

“4. In stating, that this action could be sustained for the use of Seitzinger, administrator of Garver, when there was no evidence whatever of any connection between the said Garver and Daniel Strohecker.

“5. In stating, that on the evidence exhibited, the arrangement made by the executors of T. Grant with George Kremer, and the confession of judgment to Kremer in satisfaction of the warranty, amounted to nothing.

“6. In stating, that the article declared on, was a deed within the provisions of the act of assembly, and not merely an executory contract.

“7. In instructing the jury, that the measure of damages was the purchase-money of the land, with interest on the same from the time of eviction.

[Seitzinger, Administrator of Strohecker, for the use of Drinkel, Administrator of Garver, v. Weaver, Administrator of Grant.]

“8. In saying the plaintiffs could recover in this action,—and because the verdict was against law and evidence.”

Greer and Marr, for the appellant. 1. A lost instrument must be declared on as such. It was, therefore, improper, where the declaration was upon the instrument itself, of which *profert* was made, and the plea was *non est factum*, to permit evidence to be given of its contents. On these pleadings the agreement itself ought to have been produced. 1 Phil. Ev. 349, 404; 1 Chit. Pl. 349, 350; 1 Saund. 9, a. note.

2. The article declared on was an executory contract, which appears to have been rescinded. There was no privity of contract between John Strohecker, John Garver, and Thomas [*380] Grant, nor *any evidence of any authority in Daniel Strohecker to bind them; and if the article was not binding on them, it could not be binding on Grant as relates to them. *Bellas v. Hays*, 5 Serg. & Rawle, 427.

3. The acceptance of a deed was a satisfaction of the articles, and a waiver of all the covenants they contained. The money was not paid on the articles, but on the deed from the executors. *Crotzer v. Russell*, 9 Serg. & Rawle, 78; *Share v. Anderson*, 7 Serg. & Rawle, 60; *M'Dowell v. Cooper*, 14 Serg. & Rawle, 299.

4. The act of assembly of the 28th of May, 1715, sect. 6, *Purd. Dig.* 163, making the words grant, bargain, and sell, amount to an express covenant on the part of the grantor, clearly relates to deeds executed, and does not embrace contracts merely executory. If the article amounted to a deed, there was no necessity to stipulate in it for a deed. The authorities are numerous, that such an agreement is not a conveyance and does not divest the legal title. At common law there was no covenant implied in the conveyance of the fee simple, and the act of assembly was designed to place such an estate on a footing with less estates, in respect to which the implied covenant runs with the land, and is one of warranty, broken only on eviction, and giving an action only to the party entitled to the enjoyment of the land, who in this case was *Kremer*. Lessee of *Stouffer v. Coleman*, 1 Yeates, 393; Lessee of *Sherman v. Dill*, 4 Yeates, 295; Lessee of *Maus v. Montgomery*, 11 Serg. & Rawle, 329; *Co. Litt.* 384, a; Lessee of *Gratz v. Ewalt*, 2 Binn. 95; *Sugd.* 400. After Grant's death his estate could be bound, and advantage taken of his covenants only by having the contract executed under the act of assembly, to enable executors and administrators, by leave of court, to convey lands contracted for with their decedents. The words grant,

[Seitzinger, Administrator of Strohecker, for the use of Drinkel, Administrator of Garver, v. Weaver, Administrator of Grant.]

bargain, and sell, raise a covenant against incumbrances suffered by, and for quiet enjoyment against the grantor and those claiming under him. Here, the evidence, if it proved anything, proved a breach of the covenant for quiet enjoyment, but it was defective in not showing an eviction. Spencer's case, 3 Co. Rep. 17; 7 Johns. Rep. 258; 3 Johns. Rep. 472. There must be a special eviction, and it must be declared on as such. The evidence did not show, that the eviction was under agreement between Grant and James Stedman; nor was there anything to show, in what manner Rebecca Stedman recovered. The property was conveyed to Kremer, who alone could sustain an action, and who was liable for the purchase-money, if he colluded with Grant. Cro. Eliz. 863; 3 Com. Dig. 262; Co. Lit. 385, b; 1 Church's Dig. 311, No. 22; Id. 312, No. 26; 13 Johns. Rep. 235.

5. The measure of damages was wrong. More than the price paid for the land cannot be recovered, but less may. All that the plaintiff has lost is the purchase-money Kremer was to pay.

Greenough and Biddle, for the appellee.—1. The first point *made for the appellant is purely technical; and when justice has been done, the court will not disturb the ver- [*381] dict for a matter of mere form.

2. The covenants contained in the articles of agreement were not merged in the deed. All parties were deceived in supposing the executors had a right to execute the contract of their testator. The legal presumption, perhaps, is, that the acceptance of a deed waives the covenants contained in the articles; but where the parties act under misconception, and the intention is clearly otherwise, as it was in this case, that presumption is rebutted. *Crotzer v. Russell*, 9 Serg. & Rawle, 78; *Anderson's Executors v. Long*, 10 Serg. & Rawle, 55; *McDowell v. Cooper*, 14 Serg. & Rawle, 296; *Houghtaling v. Lewis*, 10 Johns. 297; *Bender v. Fromberger*, 4 Dall. 436; *Lessee of Sherman v. Dill*, 4 Yeates, 295. The article vested an estate in the land, and is within the act of assembly. *Neave v. Jenkins*, 2 Yeates, 107.

3. The covenant implied from the words grant, bargain, and sell, does not run with the land. It is not for quiet enjoyment, or of general warranty, but a covenant that the grantor has not done any act, nor created any incumbrance by which the estate granted by him may be defeated. This covenant was broken as soon as it was made, and an eviction was not necessary to support an action. *Lessee of Gratz v. Ewalt*, 2 Binn. 95; 4 Com.

[Seitzinger, Administrator of Strohecker, for the use of Drinkel, Administrator of Garver, v. Weaver, Administrator of Grant.]

Dig. tit. Guarantee; 2 Mass. Rep. 433; 14 Johns. 248; 4 Am. Dig. 564, No. 72; 4 Johns. Rep. 89, 93.

4. The value of the property at the time of sale, was the proper measure of damages. *Bender v. Fromberger*, 4 Dall. 444; *Delavergne v. Norris*, 7 Johns. 358; *Pitcher v. Livingston*, 4 Johns. 1; *Morris v. Phelps*, 5 Johns. 49; 9 Johns. 324; 3 Caines, 111.

The opinion of the court was delivered by

GIBSON, C. J.—Thomas Grant articted with Daniel Strohecker for the sale of a tract of land; and, having received an inconsiderable part of the purchase-money, died without having executed a conveyance. Daniel took no other step to complete the purchase; but, John Strohecker, his father, and John Garver, his father-in-law, paid the residue of the purchase-money, took a conveyance to themselves with general warranty from Grant's executors, who were empowered to sell, but only for payment of debts and education of the children; and, afterwards divided the land between them. Garver died, and his heirs conveyed with general warranty to George Kremer, who retained a part of the purchase-money to await the event of an ejectment brought by Rebecca Stedman, by whom a part of the land has since been evicted on title derived from Grant. The plaintiff had recourse, in the first instance, to the warranty of Grant's executors; but [*382] having ascertained that it bound *the executors personally, and not the estate,* he has brought this action in the name of Daniel Strohecker, on the covenant implied from the words grant, bargain, and sell, in the articles of agreement.

It is insisted that the act of assembly, by force of which such a covenant can be implied, is applicable only to conveyances executed. No express provision to that effect is found in the act itself; and there certainly is nothing in the nature of an executory contract to call for such a construction. Where the vendee has done everything on his part to entitle him to the estate, the articles are an equitable conveyance of the title; and therefore fall within the letter, as well as the spirit of the enacting clause. He sometimes obtains no other title, and for that reason alone, the law ought to be construed liberally for his protection. Where a sound price has been paid for an unsound title, I see no objection on this ground, to its being recovered back.

It has also been urged, that the implied covenant is a special

* See 16 Serg. & Rawle, 237.

[Seitzinger, Administrator of Strohecker. for the use of Drinkel, Administrator of Garver, v. Weaver, Administrator of Grant.]

warranty, which running with the land, and being broken only on eviction, gives a right of action only to Kremer, with whom Grant's representatives have compromised. From expressions used by Judge Yeates and Judge Brackenridge, in the *Lessee of Gratz v. Ewalt*, 2 Binn. 95, I first inclined to think, that such had been the contemporaneous construction; but having taken occasion since the last term to consult most of the ancients of the profession remaining at the bar, I have not ascertained that any particular opinion on the subject has generally prevailed. In the case just alluded to, the inquiry was not into the nature of the covenant, but its extent; and it was inadvertently called a special warranty, doubtless, because every other covenant to secure the enjoyment of land having fallen into disuse, the term was used generically. There is nothing then, in the way of the meaning of the legislature, as explained by itself, that "the words grant, bargain, and sell, shall be adjudged an express covenant to the grantee, his heirs and assigns, to wit: That the grantor was seized of an indefeasible estate in fee simple, freed from incumbrances done or suffered by the grantor; as also, for quiet enjoyment against the grantor, his heirs and assigns." By this, it was evidently intended to give the vendee the benefit of the distinct covenants—a covenant of seisin as regards defeasibility from the acts of the vendor, and a covenant for quiet enjoyment against disturbance by the vendor or those claiming under him. But this special covenant of seisin is broken by the existence of an incumbrance created by the vendor, the instant it is sealed and delivered. *Funk v. Voneida*, 11 Serg. & Rawle, 109. Now, every burden on the estate, or clog on the title, such as a term for years, or grant by copy of court roll, is an incumbrance, (*Vin. tit. Incumbrance*, *a), and the equity created by the sale to Stedman, was an incumbrance on the legal [*383] estate in the hands of Grant, which rendered it defeasible in the hands also of the subsequent vendee, who would therefore be entitled to an action to regain the purchase-money.

Minor points have been argued, which it is unnecessary to consider, as there is, it seems to me, at least, one decisive objection to a recovery. It is this: the contract between Grant and Daniel Strohecker was abandoned, and the money now sought to be recovered back, paid on a different contract between other parties. If the administrator of Daniel Strohecker, in whose name suit is brought, has not a cause of action, neither has the person whose name is marked as the equitable plaintiff, only to designate him as the party to receive whatever the legal plaintiff may recover. But Daniel neither obtained a conveyance, nor entitled himself to one by payment of the purchase-money. The

[Seitzinger, Administrator of Strohecker, for the use of Drinkel, Administrator of Garver, v. Weaver, Administrator of Grant.]

estate, legal or equitable, never was in him ; and his administrator, therefore, cannot have an action for a defect of title which was no prejudice to his intestate, and to recover back purchase-money which his intestate never paid. But if he cannot recover, neither can the equitable plaintiff, who claims under him as an equitable assignee. Take it, however, that his father and his father-in-law, furnished the money on Daniel's account, and that the title was made to them with his assent : still the objection remains. By putting themselves in his stead, both he and they resigned the benefit of the implied covenant, inasmuch as they cannot sue in the name for what is, both at law and in equity, an injury not to him but to them. But could they introduce themselves into the contract without the assent of Grant, or some one authorized to assent for him ? I shall attempt to show, that the executors had no authority to assent. But, as I have already intimated, Grant's contract was with Daniel Strohecker alone ; and no one else could be introduced into it, without his assent, so as to produce a personal responsibility on his part, or a representative responsibility on the part of his executors ; for no principle is better established, than that a decedent's estate can be charged only on a liability created, immediately or remotely, by himself. If the executors have altered the contract, it is not that to which their testator assented, and they can be made to respond on it, only in their individual capacity, the estate being liable to refund to them whatever the transaction added to the assets. There was then, in the first place, the introduction of new parties in the place of the vendee. But there was also the introduction of new parties in the place of the vendor, and without his assent ; for, it seems to me, the executors had no authority to perfect the contract, under the will. They were authorized "to sell and convey for payment of debts and education of the children ;" but the execution of such a power, is an entirely distinct thing from the completion of a contract made by the testator himself. If the executors could convey in this instance, they might do so where all the purchase-money but a shilling [*384] had *been paid, although the transaction could with no propriety be said to be a sale for the payment of debts or education of the children. Here a portion of the purchase-money was in fact paid ; and, as regards that portion, the conveyance was not a sale in execution of the power. But the conveyance could not be void in part, and good for the residue ; because, the act was, in its nature, incapable of apportionment. The power was a naked one, and without interest ; and, therefore, to be construed strictly, 1 Ves. 306, 2 Ves. 69 : conse-

[Seitzinger, Administrator of Strohecker, for the use of Drinkel, Administrator of Garver, v. Weaver, Administrator of Grant.]

quently, it is in this instance applicable only to a sale in the popular sense of the word. But there is a substantial difference in this respect, between a sale by the executors and a sale by the testator himself. Of the circumstances attending the latter they may be ignorant, and, therefore, incompetent to judge whether the purchaser is entitled to have the contract executed; and the parties to be affected are consequently entitled, not only to have it proved, according to the act of assembly, but the judgment of the court as to its sufficiency. It seems to me, therefore, the original contract could be perfected only by the adjudication of the court; and, pursuant to that, the executors could have conveyed to none but the original purchaser. We have, then, the case, not only of vendees who had no right to become parties, to the original contract, but also of vendors equally destitute of such a right. In what light did these parties themselves view the transaction? Undoubtedly, as a new purchase. There was an entire departure from the contract in the articles. The money was paid, not on the articles, but on a conveyance to persons who were not entitled under the articles; and, under the guarantee, not of the implied covenant in the articles, but of the personal covenant of the grantors. The original contract was evidently abandoned, (possibly because it was not thought prudent to vest the title in Daniel,) and a new one, in substance a sale, framed on the basis of it, by which alone the executors had power to convey a title.

But even if the contract were not changed, and the conveyance were taken to have been in execution of the articles, (the grand postulate of the plaintiff's argument,) it would leave him exposed to a rule of law, which would be fatal to his claim. The presumption of law is, that the acceptance of a deed in pursuance of articles, is satisfaction of all previous covenants; and, where the conveyance contains none of the usual covenants, the law supposes, that the grantee agreed to take the title at his risk, or else, that he would have rejected it altogether. This is apparent in *Howes v. Barker*, 3 Johns. 506, and decisively established by *Share v. Anderson*, 7 Serg. & Rawle, 43; *Crotzer v. Russell*, 9 Serg. & Rawle, 78, and *Houghtaling v. Lewis*, 10 Johns. 279. Down to the period of its consummation, an executory contract is subject to modification; and, where an act is done, which, without fraud or mistake, is tendered on the one side, and accepted as full performance on the other, it is *not competent to the party who accepted, to allege [*385] that some part of the original contract remains to be performed. Here there was a new covenant taken, which is inconsistent with

Seitzinger, Administrator of Strohecker, for the use of Drinkel, Administrator of Garver, v. Weaver, Administrator of Grant.

the supposed retention of the old one. There may, undoubtedly, be cases where the acceptance of a conveyance will be but a part execution of the articles, as in *Brown v. Moorhead*, 8 Serg. & Rawle, 569, where a covenant to convey a particular tract of land, and also to cause the interest of a third person in another tract to be conveyed, was held, not to be satisfied by a conveyance of the first mentioned tract. But to rebut the presumption which the law would otherwise make, the intention to the contrary must be clear and manifest. The case of *Anderson v. Long*, 10 Serg. & Rawle, 55, is not an exception. There the articles were admitted to show, not an unsatisfied responsibility, but the consideration of the bond on which the suit was founded; and, as regards the stipulation, that the debt should not be demanded without six months' notice, the object was to show fraud or mistake. In the case at bar, there is nothing to oppose the presumption, but on the contrary, a strong circumstance in corroboration of it; and it, therefore, seems to me, the objection to the verdict on this ground, is insuperable.

The root of the error is to be found in the supposition, that the covenant of the executors would bind the estate of their testator. Its liability could be preserved only by proving the contract, and taking a conveyance in pursuance of an adjudication of the court, in which the operative words grant, bargain, and sell, would have been as effectual as when used by the testator. In this way, or in pursuance of a power delegated in the will, but no other, could the executors have subjected the estate to the consequences of their covenant; and, in this way, might the purchasers have paid their money on the credit of the estate: they chose to pay it on a covenant which pledged nothing but the credit of the executors, and the mistake is incurable.

It might seem to admit of a doubt, whether Daniel Strohecker's administrator may not recover back that part of the purchase-money which was paid in the lifetime of Grant. A decisive objection is, that he cannot recover for what was no injury to him—a defect in a title, which, in equity or at law, was never conveyed to him. His remedy was on the covenant to convey, and his course was to entitle himself, by proving the contract, and tendering the purchase-money; in which case, had the executors not tendered an unexceptionable title, he might have recovered against them for rescinding the contract, or have accepted the title, and maintained an action on the implied covenant of seisin in the conveyance. Instead of this he pursued a

[Seitzinger, Administrator of Strohecker, for the use of Drinkel, Administrator of Garver, v. Weaver, Administrator of Grant.]

course unauthorized by the act of assembly, and precluded himself altogether.

TOD, J., and SMITH, J., dissented.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 5 Wh. 458; 3 W. & S. 230; 4 W. & S. 18; 7 W. & S. 203; 1 Barr, 56; 2 Barr, 35; 7 Barr, 123; 1 J. 167; 2 H. 337; 4 C. 290; 7 C. 236; 12 C. 97; 1 Wright, 326; 8 Wright, 394; 8 S. 483; 27 S. 141; 6 N. 374; s. c. 6 W. N. C. 325; 5 O. 19; s. c. 12 W. N. C. 211.

Cited by the Court, 2 Penn. R. 530; 3 Wh. 325; 9 W. 270; 3 C. 131; 8 C. 20; 10 C. 427; 1 G. 137; 8 S. 485.

*[SUNBURY, JUNE 15, 1829.]

[*386]

Ripple and Others *against* Ripple and Others.

APPEAL.

The laws of another state, a member of the Union, are to be proved as the laws of a foreign country.

The maxim *omnia presumuntur rite esse acta*, is as applicable to judicial proceedings in such a state, as to those in our own.

Those who take an estate under a defective conveyance, are estopped from denying its validity.

Although land devised is not expressly charged with the maintenance of infirm children of the testator, yet, if such an intention can be clearly collected from all the parts of the will, considered in reference to the testator's circumstances, the charge will attach upon the land, and follow it into the hands of subsequent purchasers.

What is a sufficient notice of such a charge to affect subsequent purchasers.

The court inclined to think, that paupers, supported by the township, might unite with the overseers of the poor in an ejectment; but at any rate, refused to grant a new trial on that ground.

APPEAL from the Circuit Court of *Huntingdon* county, held by Smith, J., August 18th, 1828.

The action removed from the Court of Common Pleas, was an ejectment for a tract of land in Springfield township, brought by Elizabeth Ripple, and Catharine Ripple, and the overseers of the poor of Shirley township against Peter Ripple, John Cook, and Charles M'Gee. The two women were idiots, the daughters of Philip Ripple, and were supported by the township. Their father being desirous of purchasing the tract of land in question, wrote a letter, dated February 8th, 1813, directed to his brothers-in-law, John Shaver and Peter Shaver, sons of Nicholas Shaver, who had been owner of the property, intimating his desire to make the purchase, and authorizing his son John, the bearer of the letter, to conclude the bargain;

[Ripple and others v. Ripple and others.]

but, before the return of the son, the father sickened and died. His will bore date February 15th, 1813, and appeared to have been proved on the twenty-third of the same month, in the County Court of Jefferson county, Virginia, where the testator resided. The probate was certified by the clerk of the court, under his official seal, and the presiding justice of the same court, certified under his hand and seal, that the individual was clerk of the said court, and that his attestation was in due form of law.

The will, so far as it is material to the present case, was in these words:—"First. It is my will, and I desire that the articles of agreement that I entered into with George Reynolds, Sen., on the 8th day of February, 1813, for the premises I live on, and the other articles therein mentioned, shall be complied with by my executors hereinafter mentioned.

[*387] **"Item.* And if my son John should have articted for the land that belonged to my father-in-law, according to a letter I wrote to the executors of his estate, it is my will, that the title is to be made in manner and form as follows, that is, if he has articted for the two places I wrote to them I wished to purchase, the tract on which my father-in-law lives; it is my will that the title should be made to my sons John and Philip; the title for one-fourth part of the said tract, at the upper end, is to be made to my son John, his heirs and assigns forever, and the other three parts is to be made to my son Philip, his heirs and assigns, forever. And my son John is to pay two hundred and eighty pounds towards the said lands; and, my son Philip is to keep and provide for my beloved wife, and my two eldest daughters, Catharine and Elizabeth, during their natural lives. And my son John is to have my wife's share of her father's movable estate, to be paid in part of the two hundred and eighty pounds that he is to pay towards the said land. It is my will, that if my son John has articted for the other place, directed in my letter, the title for the said lands is to be made to my sons Peter and Lewis, them and their heirs and assigns, forever. And the said Peter and Lewis is to pay my youngest daughter, Susanna, eighteen pounds every year, until she arrives to the age of eighteen years; my sons Peter and Lewis is to pay three hundred pounds to her, her heirs, and assigns; and, if the last-mentioned tract should not be purchased, the money left of my estate, after paying for the first-mentioned tract, is to be equally divided between my sons Peter and Lewis, and my daughter Susanna; and if neither of the tracts are not purchased by my son, according to my letter, the articles first-mentioned between me and Reynolds, is to be null and void; and the place whereon I now live, is to be held by my

[Ripple and others v. Ripple and others.]

beloved wife and children until my youngest arrives to her lawful age, and then it is my will, that it shall be sold by my executors, and divided as follows, in the manner and proportions I had allotted the lands to be divided: the tract on which my father-in law lived was supposed to contain two hundred and sixty acres, at eighteen dollars per acre, and the other place was supposed to contain the same number of acres, at ten dollars per acre; and if my son should have made the purchase herein mentioned, it is my will, that all my movable property shall be sold, excepting, &c., and the money arising from the sale of my movable property, is to pay my debts, and the residue, if any, after my debts are paid, is to be appropriated to the paying for the lands herein mentioned. It is my will, and also my meaning, that the place whereon I now live, is to be held under the above conditions, (that is to say,) that my son Philip is to work the land, and pay a rent of one-third, for the use of my beloved wife and three daughters herein named. It is my will, that Martin Bellmire and George Reynolds, Jr., be my executors," &c.

An article of agreement, dated February 8th, 1813, between Peter *Shaver and John Shaver of the one part, and [*388] Philip Ripple of the other, (not signed,) for the sale of the premises in question, was next given in evidence, though objected to by the defendants' counsel. After the death of old Philip Ripple, an agreement for the sale of the place, was entered into between P. and J. Shaver, as administrators of Nicholas Shaver, and Martin Bellmire and George Reynolds, executors of Philip Ripple, dated March 3d, 1813, the reading of which was objected to by the defendants, but admitted by the court. The purchase-money was paid by the executors of Philip Ripple to the administrators of Nicholas Shaver, whose heirs afterwards, in pursuance of the last-mentioned agreement, executed a deed for the premises to Philip Ripple, the devisee. Philip Ripple leased the property to Peter Ripple, who was "to keep the two girls, Catharine and Elizabeth Ripple." On the 4th of March, 1820, judgment was obtained by one John Borker against Philip Ripple, son of the testator; and, on the 20th of May, in the same year, Cook and M'Gee also obtained judgments against him, on which they proceeded to execution and sale, became the purchasers, and received a deed-poll from the sheriff. Notice was publicly given at the time of the sale, and previously to it, that the land was liable to the maintenance of the two females. The manner in which notice was given, is stated by the Chief Justice, in giving the opinion of the court, and, therefore, need not be repeated here.

Several exceptions were taken to the charge of His Honour,

[Ripple and others v. Ripple and others.]

as well as to the admission of certain parts of the evidence. The jury found a verdict for the plaintiffs, "to be released on the payment of six hundred and forty-one dollars and ninety-nine cents, already expended in the support of Catharine and Elizabeth Ripple, and on the maintenance and support of the said Catharine and Elizabeth by the defendants, John Cook and Charles M'Gee."

After an ineffectual attempt to obtain a new trial, the defendants appealed to this court, where *Miles*, for the appellant, contended, that the will of Philip Ripple was improperly admitted in evidence. Our act of assembly requires, that the probate of a will, executed out of the state, shall be made before persons having authority to take probates of wills, &c., and it was not shown, as it ought to have been, that the court of Jefferson county had any such authority.

2d. The articles of agreement ought not to have been received in evidence. It did not appear that Peter Shaver and John Shaver, administrators of Nicholas Shaver, had any authority as such, to pass the land to any person whatever. The will of Philip Ripple was not to operate upon the land, unless his son John had entered into valid articles for the purpose, prior to the death of the testator.

3d. The will is not sufficient to charge the land in the hands of Philip.. No provision is made out of the land as a fund.

4th. The notice at the time of the sheriff's sale was insufficient, not having come from the very party in interest. *Sugd. on Vend.* 532. But if the notice were given by the proper parties, it was not *full and sufficient. *Purd.* 390; 4 *Dall.* [389] 320. There was a regular chain of title on record, of which the will was no part; and, therefore, the notice was not sufficient to lead to full knowledge. *Peebles v. Reading*, 8 *Serg. & Rawle*, 495. The question of notice is matter of law. On this point he also cited, *The Bank of North America v. Fitzsimons*, 3 *Binn.* 361; *Semple v. Burd*, 7 *Serg. & Rawle*, 291.

5. The action is improperly brought in the names of the paupers, and of the overseers of the poor. After the paupers were settled in, and supported by the township, the title wholly vested in the overseers of the poor. The two females cannot support an action jointly with the overseers. *Purd.* 683.

Blanchard and Potter, contra, were stopped by the court.

The opinion of the court was delivered by

GIBSON, C. J.—The certificate of the presiding justice of Jefferson county, that the attestation of the clerk is in due

[Ripple and others v. Ripple and others.]

form of law, was sufficient to introduce the exemplification of the will. The laws of Virginia are to be proved as the laws of a foreign country; but, the acts of the courts may, undoubtedly, be resorted to for their exposition. To the act of the county court, in holding jurisdiction of the subject of probate, the maxim *omnia presumuntur rite esse acta*, is as applicable as it is to judicial proceedings in our own state.

The articles of agreement were competent evidence, because they constitute a part of the title under which all parties claim; and it is, therefore, immaterial, whether the executors derived an authority to complete the purchase under the will. Having ratified their acts by taking the estate subject to the provisions of the will, Philip, or any one claiming under him, is estopped from denying their authority.

The intention to charge the premises with the maintenance of the testator's daughters, Catharine and Elizabeth, although not expressed in terms, is, nevertheless, clear and satisfactory. It is to be collected from all the parts of the will considered in reference to the testator's circumstances. Having articleed for the sale of the mansion place in Virginia, he sends his son to Pennsylvania to purchase the premises in dispute; but before his return, sickens, makes his will, and dies. He provides contingently for the projected purchase, by directing his executors, in case it should be effected, to execute the contract for the sale of the mansion place; and he devises the premises in question to his son Philip, coupled with this clause:—"My son Philip is to keep and provide for my wife and my two oldest daughters, Catharine and Elizabeth, during their natural lives." He also provided for the failure of the contemplated purchase, by forbidding the executors, in that event, to complete the sale of the mansion place, and by directing, that it be held by his wife and children till the youngest come of age, Philip working the land, and rendering a third of the produce for their *use. He further directs the place to be sold when the youngest [*390] shall have come of age, and the proceeds to be distributed in the same proportions, and among the same persons to whom the land expected to be purchased by his son, would have gone. Thus, the premises in dispute were to be a substitute for the mansion place, which was expressly charged with the maintenance of the widow and children, while such a charge should not be in the way of the testator's ulterior arrangements in respect of distribution. But as regards the premises in dispute, there are no arrangements which are inconsistent with an indefinite continuance of such a charge; and there is, therefore, no reason why his views in regard of the premises, should be, in any respect, different from those he entertained in regard to the

[*Ripple and others v. Ripple and others.*]

mansion place. The gift to Philip was on a condition which, in consequence of its very nature, adhered to the land. A legacy may undoubtedly be charged on the land by implication, as was done in *Nichols v. Postlethwaite*, 2 Dall. 131; *Hassan-clever v. Tucker*, 2 Binn. 526; *Witman v. Norton*, 6 Binn. 395; and *Dobbins v. Stevens*, 17 Serg. & Rawle, 13. No form of words is necessary to produce the effect; and, where the intent is manifest, courts are bound to carry it into execution. There were powerful motives for such an intention here. The subsequent insolvency and death of Philip, have shown, that his personal responsibility would have been an unsafe pledge for the performance of his duties to his sisters. No father would consent to commit the maintenance of his daughters, in all the helplessness of idiocy, to a security so precarious.

Pursuant to the instructions of the testator, his son agreed with the vendors on the terms of the purchase, but did not enter into articles agreeably to the letter of the condition on which the land was to pass by the will; and it was nevertheless agreed on all hands, that the executors should complete the purchase as if articles had been executed. Accordingly, they paid the purchase-money, and the vendors executed a conveyance to Philip, according to the testator's directions. Hence, as the defendants claiming under Philip, derive the legal estate directly from the vendors, and not through the will, it was necessary to affect them with notice of the equitable incumbrance of the daughters' maintenance. To this end it was proved, that an uncle of the daughters, and an inhabitant actually rated in the township in which they are settled, gave actual notice to one of them at the sale, and to the other a short time previous, the third being merely a tenant. In addition, it was shown, that another rateable inhabitant of the same township, had not only informed them of the existence of the incumbrance, but had repeated to them nearly the words of the will by which it was created. Now, although a purchaser may disregard rumours, set afloat by those who have no right to intermeddle, he is bound to attend to the admonitions of a party in interest. Here the daughters, although actually [*391] charged to the township, had an interest of their *own, from attending to which, they were disabled by idiocy; and, surely one so near in blood as an uncle, might lawfully interpose for their protection. The overseers may also interpose; but, as they may be ignorant of the rights or claims of the paupers committed to their charge, every rateable inhabitant has an interest which renders him competent to act in the matter for the common good. The information given was full, direct, explicit, and amply suffi-

[Ripple and others v. Ripple and others.]

cient to put the purchasers on an inquiry, which, had it been pursued, would have terminated in a perfect knowledge of all the circumstances.

The concluding objection is to the joinder of the overseers and the paupers in the same ejectment. By the act of the 29th of March, 1819, overseers of the poor are empowered to recover the money, or other property of paupers committed to their charge, for the purpose of applying it to their maintenance; but whether in their corporate name, or in the name of the pauper, is not specified. Perhaps an action would lie in the name of either. But it is said, that whichever way it be taken, there cannot be an action in the names of both. By the act of the 31st of March, 1823, it is provided that in ejectments by more than one, a plaintiff failing to establish his title, may become nonsuit, and a verdict nevertheless pass for the others. Now had the overseers or the paupers become nonsuit here, the case would have been within the letter of the act. Even as it stands, it is so entirely within its spirit, that we would not exercise a sound discretion, were we to say it is unsustainable. All parties are, in fact, interested; the overseers, in the application of the property in case of the township; and the paupers to be let into the enjoyment of their father's bounty. They have thus an interest in common, which entitles them to the possession. But were all this otherwise, we ought not to use our discretion so as trip up the parties really entitled, on a trifling objection to the form of the action.

TOD, J., having been concerned as counsel, took no part in the decision.

Judgment affirmed.

Cited by Counsel, 3 Penn. R. 69; 4 R. 444; 2 Wh. 146; 7 W. 157; 8 W. 49; 3 W. & S. 371; 6 W. & S. 283; 1 H. 349; 7 C. 56; 10 C. 292; 11 C. 56; 12 C. 12; 2 G. 30; 2 S. 361; 6 S. 483; 11 S. 169, 482; 22 S. 489; 4 N. 349; 10 N. 328, s. c. 7 W. N. C. 550; 14 N. 194, 306; 9 W. N. C. 312.

Cited by the Court, 3 R. 130; 2 W. 79; 7 W. 387; 9 W. 511; 1 J. 89; 2 J. 258; 12 Wr. 122; 22 S. 490; 2 N. 353, s. c. 4 W. N. C. 269; 4 N. 350, s. c. 5 W. N. C. 304; 10 W. N. C. 267. (As to proof of foreign law) 12 H. 446, 447; 2 C. 30; 9 W. N. C. 520.

[SUNBURY, JUNE 15, 1829.]

Milliken and Another *against* Brown.

APPEAL.

A receipt, not under seal, to one of several joint debtors, for his proportion of the debt, discharges the rest.

APPEAL from the decision of the Chief Justice, holding a Circuit Court for *Mifflin* county, on the 15th of April, 1829.

In the Court of Common Pleas, the plaintiffs, Foster Milliken and David Milliken, trading under the firm of Foster Milliken & [*392] *Co., had, on the 4th of February, 1819, recovered judgment against John Brown, William Brown, Jr., and Dr. John Watson, trading under the firm of John Brown & Co., by award of arbitrators, for five thousand eight hundred and eighty-nine dollars and ninety-six cents. In order to obtain the legal stay of execution, the defendants had procured security to be entered for the debt, interests and costs, under the act of the 21st of March, 1806. But, long before the expiration of the stay, David Milliken, one of the plaintiffs, had issued a *feri facias* upon the judgment, on which a return of "*nulla bona*" was made by the sheriff of Mifflin county. Within two days after, he also procured a *testatum fieri facias*, directed to the sheriff of Lancaster county. With this *testatum*, David Milliken proceeded to Lancaster county, where Dr. Watson resided. Upon seeing the execution, Watson paid to Milliken four hundred dollars, and afterwards sixteen hundred dollars more, and took the following receipt, viz.:

"27th of March, 1819.—Received of Dr. John Watson, four hundred dollars, in part of a judgment Foster Milliken & Co. v. John Brown & Co.

"DAVID MILLIKEN."

"May 4th, 1819.—Received, by the hands of Christian Haldeman, from Dr. John Watson, sixteen hundred dollars, a balance of two thousand dollars, his part of a judgment Foster Milliken & Co. v. John Brown & Co. For Foster Milliken & Co.

"DAVID MILLIKEN."

The consequence of this proceeding of David Milliken, as it respected the surety in the recognisance, and the ultimate de-

[Milliken and another v. Brown.]

cision of this court upon it, may be seen in the case of Milliken and others v. Brown, 10 Serg. & Rawle, 188.

It was alleged, that the taking from Watson the two thousand dollars in full of his third of the debt, operated as an entire discharge of John Brown and William Brown, Jr., and upon this ground the Court of Common Pleas opened the judgment so as to let in a defence. Issue was joined upon the plea of payment. A release was also pleaded, to which there was a replication of *non est factum*. The defence, upon the trial in the Circuit Court, was carried on by John Brown alone; William Brown, Jr., having confessed judgment for one-third of the claim, on an agreement, that no effect was thereby to be produced on the case as respected John Brown. In addition to the facts before mentioned, John Brown proved upon the trial, that at the times of the return of the *nulla bona* by the sheriff of Mifflin county, and of taking out the *testatum fieri facias*, the defendants in the judgment owned, and were in possession of real and personal estate, consisting of a forge, furnace, stills, &c., in Mifflin county. He also gave in evidence, further to enforce and explain the written receipt, the deposition of Christian Haldeman, who testified as follows:—

*“27th of March, 1819, Dr. Watson and David Milliken called upon the witness, and Watson stated [*393] that Milliken had an execution against him, Watson, for about six thousand dollars. They then came to an agreement, and Dr. Watson agreed to pay two thousand dollars, his part of the judgment, and that four hundred dollars was paid by Watson on that day. Watson left in the hands of the witness sixteen hundred dollars, to be paid to the plaintiffs, which was done by Mr. Elder in the absence of the witness, &c.”

To the following question put by the defendant:—“Do you remember what the purport of the verbal agreement was between Dr. Watson and David Milliken?” the witness answered:—“Dr. Watson was to pay Milliken four hundred dollars then, and sixteen hundred dollars in ten or fifteen days: if Dr. Watson would do that, then he, David Milliken, would exonerate him from his part of the judgment. I think you will find the receipt to say the same thing, or words to that effect.” Sunday cross-questions were put by the plaintiffs, which are not material, except that, from the answer to one of them, it appeared, that the receipt for sixteen hundred dollars had been drawn up, or the form for it given, by Watson himself. The following questions may also be excepted:—Question 8th. “At the time of the verbal agreement between Dr. Watson and Milliken, did Milliken say, that if he could recover the balance of the judgment from the property of the company, or the other partners,

[*Milliken and another v. Brown.*]

he would not look to Dr. Watson for it?" Answer. "I do not know of any such agreement, or conversation." Question 9th. "What did you understand by the word exonerate, as applied to the verbal agreement between Dr. Watson and Milliken?" Answer. "I considered it was in full for his part of the judgment for about six thousand dollars." Question 10th. "Did you believe that it was intended to exonerate either John Brown or William Brown, Jr.?" Answer. "I did not, but to exonerate the doctor only."

Upon this evidence His Honour, the Chief Justice, charged the jury, that the acts, the receipt of two thousand dollars, and the agreement of David Milliken, amounted to a release to John Watson and to the present defendant; and that in point of law, the plaintiff could not recover. The verdict being for the defendant, a motion was made for a new trial, which was refused, and this appeal thereupon brought by the plaintiffs, alleging error in the charge of the Chief Justice.

Hale and Blythe, for the appellants.—The plaintiffs might have levied their whole debt upon the property of any one of their joint debtors, and in receiving a part from one, and looking to the others for the residue, they did no more than agree to do that, which, without agreement they might lawfully have done. Even a release under seal to one of two obligors, may not in equity operate as a discharge to the other. Parties are bound only so far as they intend to be so. *Kirby v. Taylor*, 6 Johns. Ch. Rep. 242. But it is settled by many authorities, [*394] that anything short of a technical *release under seal to one of several joint debtors, does not exonerate the rest. The ground upon which the old cases go is, that a technical release is satisfaction, but a receipt of less than the whole debt, without a release, is not satisfaction. *Cumber v. Wane*, 1 Stra. 426. A receipt in full is not conclusive, but may be explained. *Putnam v. Lewis*, 8 Johns. 304. And if a note of a third person be taken for goods sold and delivered, it is no payment, unless the vendor specially agrees to take it absolutely as such. It ought to have been left to the jury to determine whether the money was received in satisfaction of the debt. *Johnson v. Weed*, 9 Johns. Rep. 310; *Tobey v. Barber*, 5 Johns. Rep. 68. A receipt for part of the debt from one joint debtor, and an agreement not to look to him for the remainder, is a covenant not to sue, and not a release, and, therefore, does not discharge the other joint debtor. A release of one must be a technical release under seal, in order to discharge both. *Rowley v. Stoddard*, 7 Johns. Rep. 207; *Harrison v. Close*, 2 Johns. Rep. 448; 17 Johns. Rep. 174; 20 Johns. Rep. 78, 462. Here

[Milliken and another v. Brown.]

the plaintiffs did not even discharge Dr. Watson; they might still have gone against him; but admitting he was discharged, there was nothing in the agreement to prevent either of the Browns from having recourse to him, in the event of their being obliged to pay the money.

Potter and Blanchard, contra.—The money having been received from Dr. Watson before the stay of execution had expired, and consequently before the debt was payable, there was a valuable consideration for the discharge, though it was not under seal; for it is well settled, that payment before the day, of a less sum, is good satisfaction. Cro. Eliz. 45; Pinel's Case, 5 Co. 117. A release to one of two joint and several obligors, discharges both. 5 Bac. Ab. 713; Co. Lit. 232, 236; 2 Salk. 374; Needham's Case, 8 Co. 270; 2 Roll. 411; Heckinote's Case, 9 Co. 52; Co. Eliz. 161; 6 Cro. 218; Barrington v. The Bank of Washington, 14 Serg. & Rawle, 425. So satisfaction received from one, or a release executed to one of several joint trespassers discharges all, though the liability of the others be specially reserved. Rulh v. Turner, 2 Hen. & Munf. 38. In trespass the jury cannot sever the damages. Hill v. Goodchild, 5 Burr. 2792. And a release by one of several partners is good against all. Piersons v. Hooker, 3 Johns. Rep. 70. Upon the same principle, that satisfaction from one joint and several debtor exonerates the other, a judgment obtained against one partner, is a bar to a suit against a dormant partner. Smith v. Black, 9 Serg. & Rawle, 142. The judgment was a lien on the property of the partners. The execution could not have been levied on the interest of the two Browns in the partnership property, for instance, in the stock in the iron works which they carried on as partners. Nor could a *scire facias* issue on the judgment against the two Browns omitting Watson. It follows, that all must have been bound, or none were bound. In substance, the paper given by the *plaintiffs to Watson was a release. That it was not under seal did not [*395] diminish its legal effect. In equity, a parol release is valid. The intention being everything, the mode of discharge is immaterial. In Pennsylvania a seal is by no means necessary to the efficacy of a release. This has been determined in relation to so solemn an instrument as a mortgage, which may be discharged by parol. Wentz v. Dehaven, 1 Serg. & Rawle, 319. The conclusion to be deduced from all the cases is, that the exoneration of Watson, was on a valuable consideration, and that being in substance a release of a joint debtor, it discharges all. The authorities are clear to this effect, and they are founded in reason. If the Browns were left to pay the debt, and demand contribu-

[Milliken and another v. Brown.]

tion from Watson, the exoneration of him, for which the plaintiffs received a valuable consideration, would be frustrated. If, on the other hand, they are not to have contribution, then in case of the insolvency of one of the two remaining debtors, the other would have to bear the burden of two-thirds of the debt, which would be unjust. The plaintiffs are, therefore, involved in the dilemma, of doing an injury either to Watson or his co-debtors. This they could not do. They were bound to make their release good in a way not to jeopard any one, and that they could only do by resigning their claims to the residue of the debt.

The opinion of the court was delivered by

HUSTON, J.—A suit was originally brought in the Court of Common Pleas of Mifflin county, by Foster and David Milliken, trading, &c., against John Brown, William Brown, Jr., and John Watson, under the firm of John Brown & Co., and a judgment obtained on the 4th of February, 1819, for five thousand eight hundred and eighty-nine dollars and ninety-six cents. On the 18th of March, 1819, the defendant gave bail absolute for the payment of the money, in order to obtain stay of execution for one year, according to the act of assembly. Notwithstanding this, David Milliken, one of the plaintiffs, procured a writ of *feri facias* to be issued in Mifflin county on the 23d of March, 1819; and, the sheriff of Mifflin county indorsed a return of *nulla bona* thereon, although the furnace, forge, and stock of the defendants were in that county, and although both John and William Brown, Jr., who lived in that county at that time, had each of them large real and personal estate, and this well known to the plaintiffs and sheriff. On the 24th of March, David Milliken procured a *testatum feri facias* to be issued, directed to the sheriff of Lancaster county, where John Watson lived, and was of considerable wealth; but who, living at a distance, knew nothing of the suit or judgment, or bail for stay of execution. David Milliken called on John Watson with the *feri facias*, who, being uneasy at the idea of so large an execution against him, agreed to pay four hundred dollars at once, and did pay it; and [*396] further agreed to pay, and did pay into the *hands of Christian Haldeman sixteen hundred dollars more, within a few days, for the plaintiffs. This was expressly on an agreement to exonerate him from all further liability on that judgment, as was expressly proved by Mr. Haldeman, and the receipt given by Milliken, which was in these words:—"May 4th, 1819, received by the hands of Christian Haldeman from Dr. John Watson, sixteen hundred dollars, the balance of two thousand dollars, his part of a judgment Foster Milliken & Co. v.

[Milliken and another *v.* Brown.]

John Brown & Co., for Foster Milliken & Co., David Milliken." Nothing further was done until the expiration of the year, when a suit was brought against William Brown, Esq., father of John and William, on the recognisance of bail, reported in 10 Serg. & Rawle, 189. Afterwards, in consequence of the opinion given in that case, among other reasons, the judgment was opened so far as to let the defendants into a defence; and they pleaded payment, with leave, &c., a release and issues taken. At a Circuit Court in April, 1828, the cause came on to be tried. John Brown was then absent from this state. After the jury was sworn, there was taken, by consent, a judgment against William Brown, Jr., for one-third of the original debt and interest to that time, with an agreement that this was not to affect the claim of the plaintiffs against John Brown; that the names of William Brown, Jr., and John Watson were to remain on the record, but they were not to be affected by any judgment which might be recovered against John Brown: and the jury were discharged.

At April Circuit Court in 1829, for Mifflin county, the cause came on before the Chief Justice, who directed the jury, that the acts, the receipts and the agreement of David Milliken, discharged John Watson; and also, discharged John Brown, the only defendant before him: and verdict for the defendant, motion for a new trial overruled, and judgment and appeal.

It is understood that it was not contended at the Circuit Court, and certainly it was not much insisted on here, and could not have been with effect, that John Watson is not totally discharged; but, it was contended, 1. That although a release will discharge one of several co-defendants, and will also be a release of all, yet, it must be a technical release under seal: but, that a receipt, a paper not under seal, will not have that effect, and that a receipt, though in writing, is always open to explanation, and cited, *Putnam v. Lewis*, 8 Johns. 304, and *Johnson v. Weed*, 9 Johns. 310, which certainly say so; and also 2 Johns. 449, and *Rowley v. Stoddard*, 7 Johns. 207, which do say, that a receipt in full to one defendant, does not discharge the co-defendants, but that a technical release under seal will.

The courts of New York have been composed of men of such knowledge and character, that their decisions are entitled to great respect; and it is with diffidence they are questioned. We are obliged, however, sometimes to question them, and to decide *contrary to them, or to give up, not barely a course of [*397] our own decision, but our whole system of jurisprudence. They have separate courts of law and equity, and they have kept up the line of distinction between these as pointedly, perhaps I might say, as fastidiously, as it was done in England before Lord Mansfield's time, and certainly more than is done

[*Milliken and another v. Brown.*]

now. We, on the contrary, exercise the two jurisdictions by the same court and jury, at the same time, and instead of giving a verdict and judgment against a man in one court, with a full knowledge that he will be relieved in another, we, if he is entitled to relief, give it at once in the trial of the cause. One of the most marked distinctions arising from this is, that a writing, especially if under seal, is received in their courts of law, (except a receipt, and why it is an exception I do not know, though perhaps they do.) But, mistake or fraud must be proved there, and relieved against in Chancery: here it is done in a court of law.

There was a time in the history of the law when, like everything else of that day, it was a system of metaphysics and logic; and, when the cause was decided without the slightest regard to its justice, solely on the technical accuracy of the pleaders on the several sides: defect of form in the plea, was defect of right in him who used it. This period of juridical history, however, was in some respects distinguished by great men, of great learning, and abounds with information to the student. At the time I speak of, payment of debt and interest on a bond, the next day after it fell due, was no defence in a court of law; nay, it was no defence to prove payment without an acquittance before the day; nay, if you pleaded and proved a payment, which was accepted in full of the debt, yet, you failed unless your plea stated that you paid it in full, as well as that it was accepted in full; or, perhaps, because you pleaded it as a payment, when you ought to have pleaded it as an accord and satisfaction. An act of parliament or two, and the constant interference of the Court of Chancery, granting relief, have changed this in a great measure; but, it is not a century since it was solemnly decided, that if a creditor, finding his debtor in failing circumstances, and being afraid of losing his debt, proposed to give him a discharge in full if he paid half the money, and the debtor borrowed the money, and paid the one-half on the day the bond fell due, and got an acquittance in terms as explicit as the English language could afford, yet, if sued, he must pay the rest of the debt; for, it was impossible, say the court, payment of part could be a satisfaction of the whole: but, if part was paid before the day, it was good satisfaction of the whole. I mention this not from a general disrespect of the law or lawyers of the days I speak of, but for another purpose. It has, alas! become too common for men of good character and principles, but who trade on borrowed capital, to fail, and their creditors are glad to receive fifty cents in the dollar, and give a discharge in full; and I do not know the lawyer who would be hardy

[Milliken and another v. Brown.]

enough to deny *the validity of such a discharge, although given after the money was due, and although [*398] the discharge was not under seal, or although it might be doubtful whether it could more properly be called a receipt, or a release, or a covenant never to sue, if the meaning can be certainly ascertained, and no fraud, concealment, or mistake at the giving it, it is effectual. It avails little then, to go back to the last century, or further, to cite cases in which a matter was of validity, or effect, according as it was couched in this or that form. Universally the law is, or ought to be, that the meaning or intention of the parties is, if it can be distinctly known, to have effect, unless the intention contravenes some well-established principle of law. I refer to *Wentz v. Dehaven*, 1 Serg. & Rawle, 312, as fully settling, that a seal is not necessary to a release of a debt, secured by the most formal sealed instrument. This case brings the law in this state to this: That a discharge, acquittance, or release, call it what you will, is as valid without a seal as with it; and, I know of no instrument which is not so, unless where a positive act of assembly requires a seal. The form of action, or the plea, may be different, but in some way, if plain and fair, it has effect.

It may be conceded, that David Milliken had no intention to release John Brown or William Brown, Jr.; nay, there is no reason to believe that Dr. Watson, expected, or even suspected any such result. The effect, if produced, is not from the words of the instrument or design of the parties; perhaps, there was no design to release any other than the one named, in any case, where such release has had that effect; yet, it did produce that effect from the earliest times of the law. In *Fitz. N. B.* 238, letter M., if two are severally bound in statutes, and recognizee release the statutes to one of them, and then sue execution, they shall have *audita querela*. Hence, it would seem, relief was had, before chancery had assumed such jurisdiction. The same law is found in *Co. Lit.* 236; 9 *Co.* 270; *Needham's Case*, 5 *Co.* 52; *Heckinote's Case*, 1 *Ld. Raym.* 690, "Where a covenant is joint and several, a release to one is a release of all: like the case of joint trespassers, which is joint or several at the election of the plaintiff, but a release to one discharges all." And "there is no doubt but a release to one co-obligor is a release to both, in equity as well as at law." 1 *Atk.* 294. And it produced the same result, although there was an express proviso in the release that it should not discharge the co-obligor. 5 *Bac. Ab.* 703. For this he cites *Litt. Rep.* And in 2 *Dessaussure*, page 1, we find the case, where one of several co-obligors in a bond, and who was only

[Milliken and another v. Brown.]

a surety, obtained a release from the obligee, who afterwards assigned the bond to the state, whose indents had been lent; the state brought a suit in chancery against P. who had obtained the release. "It was," says Rutledge, Justice, "objected, that the release was provisional, that the other obligor should still be bound, or it should have no effect. The release does not purport anything of the kind; it is absolute, and [*399] the obligee, (who was attorney *general,) must have known it would have the effect to release all of them. As to the idea, that the release was to be kept secret, and the co-obligors made responsible, it was absurd; because, if the bond had been sued, the defendant, P., must have been sued with the others, and his pleading the release would have been an effectual bar to a recovery against them all;" and he proceeds to show, that as the defendant had obtained his release fairly he was discharged, though thereby all the others were so also. So, if one of two judgment debtors, who is not bound as between themselves to pay more than half, pays all, the judgment cannot be kept alive to recover the other half for his use from the other. 9 Mass. 138. And if one of two debtors on a judgment is taken on a *capias ad satisfaciendum*, and discharged by the plaintiff, the judgment is gone as to the other. *Ibid.*, and cases there cited.

It is true, some of the cases cited in the argument seem to put the discharge on some magical effect of a seal; but, it has been shown, that in this state at least, a seal is not necessary. The general position, that a release of one is a discharge of all, is not denied in any case: it is equally effectual at law and in equity. Has it not its foundation laid deeper than some of the cases suppose, in this, that where several persons have contracted together, and several of them are bound to one in a certain way, that one shall not of his own accord, or by collusion with one of them, change their several responsibilities? It is the same principle which, when four agree to go surety in a bond jointly and severally for one, and three sign it, and the bond is expressly left to be signed by the other, who never signs it, none are bound. *Pawling v. The United States*, 4 Cranch, 219. There would occur technical difficulties also. On a *scire facias* to reverse this judgment, could there be judgment for John Watson and against the others, or one of them? There is a judgment confessed against William Brown, Jr., for one-third and interest till April, 1828; if this cause should go back, can there be another judgment against John for another one-third and interest till next year, and different executions against different persons in the same suit, for different and dis-

[Milliken and another v. Brown.]

inct sums? The arrangement with Watson and with William Brown, Jr., if none with Watson, discharge John Brown.

Everybody knows, that generally, an undivided interest in a farm, a house, a furnace, &c., will not sell as well in proportion as the whole will. Can John Watson and the plaintiff change the law, and sell the undivided interest of each of the other partners, against their consent, separately, for a judgment which bound the whole property? A rich partner might in this way, easily become owner of all the shares.

There may be hardship in this case; if there is, it was occasioned by very shameful conduct of one of the plaintiffs. There are some things the law will not permit. You cannot give a title in fee simple and restrain the right of selling, &c.; nor can a judgment *creditor release one of the defendants, [*400] and hold the others bound. Even a release of part of [*400] mortgaged premises, was a release of the whole until an act of assembly of the 2d of April, 1822, was passed, allowing the mortgagee, on receiving a proportionable part of the mortgage money, to release a portion, and still recover the residue from the remaining mortgaged premises.

Note.—See 14 Johns, 330. One of several parties to a contract under seal, to perform certain work, releases by parol the other party from performing the work; this is valid.

TOD, J.—I am not able to concur. I take it, that the fact of the premature *testatum* execution, unjustifiable as it was, must be thrown out of the case on this writ of error. The injury should be redressed by the proper form of action, in the name of the proper person. The damages ought not to fall entirely upon Watson, and the indemnity all to go to John Brown. Besides, from the case in 10 Serg. & Rawle, 188, the Millikens appear to have paid the penalty of the act by the complete loss of their security.

I agree, that in the case of a debt not yet payable, the creditor may, if he thinks fit, accept much less than his due, and give a valid discharge of the whole. But that, I apprehend, is only where the creditor intends to discharge the whole. Here, it is not pretended to be said, that either Milliken, who received, or Watson, who paid the third of the debt, had the least imagination of exonerating John Brown and William Brown, Jr., from the other two-thirds. But it is supposed, that the law imperatively gives to the transaction an effect which the parties never meant, and that a release to one is a release to all. With some diffidence, and with great respect for the opinion of the court, I would hold, that a discharge of one joint debtor, on receiving his share of the debt, can operate an extinguishment and for-

[Milliken and another v. Brown.]

feiture of the residue, against the intent of the parties, only in case of a strictly technical and legal release under seal. All the authorities appear to be so. *Harrison v. Close*, 2 Johns. Rep. 448; *Ib.* 186; 2 Salk. 575; 2 Saund. 48; 9 Johns. Rep. 310; 8 Johns. Rep. 389; *Rowley v. Stoddard*, 7 Johns. Rep. 210, held, that on receiving part of a debt from a joint debtor, and discharging him, in order to produce the effect of discharging the other debtors, against the intent of the parties, the release must be technical and under seal; and that a mere receipt in full, can produce no such injurious consequence. After citing many authorities, the decision concludes, that it cannot be pretended that a receipt for part only, though expressed to be in full of all demands, must have the same operation as a release. There is a case, not cited at the bar, which appears to me to be strong. *Ruggles v. Patten*, 8 Mass. 480. An action against one of several joint promisers in a note of hand: the plea was payment by one of the promisers of three hundred and seventy-eight dollars, made and received in full of his, the said Samuel's quarter part, and that he, the payee, did then and [*401] *there exonerate, acquit, and discharge the said Samuel from any further payment of the said note. Upon a general demurrer to this plea, the decision was in favour of the plaintiff, the court holding, that payment of part by one joint debtor effects no discharge of the others.

Indeed, I would be almost ready to say, that if instead of a bare receipt to Watson in full of his share, it had been a release to him, under seal, still it would be against all equity that a party should be thus entrapped by his ignorance, and by the formality of a seal, into the loss of two-thirds of his debt. The very case came before a Court of Chancery, in *Kirby v. Taylor*, cited at the bar, 6 Johns. Ch. Rep. 242, where it was decided, that a release, under seal, given to one joint obligor, should discharge him only, and not the rest. And 2 Com. Dig. Ch. 4, L. 2, is express, that if a release goes beyond the intent of the parties, it shall be avoided in equity. In the argument of the counsel, inconveniences have been attempted to be shown, if one of several joint debtors could be permitted to pay his share and be discharged; and, it is said, that if John or William Brown, Jr., should prove insolvent, and the other be compelled to pay the remaining four thousand dollars, he who should so pay, could not sue Watson for contribution, but would be barred by the receipt in full, signed by Milliken. Now, as to this matter, it seems to me, that there might be said to be some risk of loss to the Millikens, by discharging one of the debtors from the residue of the debt; but, that John Brown and William Brown, Jr., could have no possible ground of just complaint, because they

[Milliken and another v. Brown.]

were exonerated for ever to the amount of two thousand dollars, whereas before, they were liable each one for the whole debt. And as to the law on this head, even the holder of an accommodation note, who has received a composition from, and who has covenanted not to sue the payee, for whose accommodation the note was made, may, notwithstanding, sue the maker, though on payment of it, he, the maker, will have a right of action against the payee. And if the holder release to the payee all claims in respect to the note, not knowing that he is a surety, this will not discharge the maker. Chitty on Bills, 381.

The doctrine relied on at the bar, of satisfaction by one joint trespasser, is not to the purpose. For there appears much difference between matters of contract and matters of tort. If two join in a battery of the person, or in a libel upon the character of another, and the party injured receives a sum of money from one in full satisfaction as to him thus paying; as the just amount of damages must be wholly uncertain, the law, therefore, perhaps, necessarily supposes, that a second satisfaction from another defendant, will be a double satisfaction for the same wrong. But it seems to me, if two men join to borrow one hundred dollars, and the lender accepting fifty dollars from one, gives him a receipt in full for his share, every one sees that the debt is but half paid; that whatever risk has been incurred in the case, has been incurred by the lender, and that any [*402] *complaint of inconvenience by the man who did not pay, and who now is liable for fifty dollars only instead of a hundred, must be groundless. The case of *Wentz and Wife v. Dehaven's Executor*, 1 Serg. & Rawle, 312, seems not opposed to my opinion. It is rather in my favour. In that case, a discharge without a seal, was held sufficient against a mortgage, a sealed instrument. And the old rule of law of *unum quodque dissolvitur*, &c., was disregarded, in order to promote the equity of the case, and the intent of the parties. Here a new rule appears to be asked for, to give to a receipt the effect of a release, and to add a seal for the purpose of defeating the intent of the parties.

GIBSON, C. J.—It seems to me that this, like every other part of the common law retained in use, is founded not only in convenience, but justice. No case can be better fitted to illustrate this, than the one at bar. Two of three joint debtors are solvent, the third is insolvent; and the creditor agrees, on sufficient consideration, to exonerate one of the two who are solvent entirely from liability. Now, the most sacred principles of justice require that this agreement be performed; and, it is admitted, that it ought to be performed. But how? By exacting,

[Milliken and another v. Brown.]

it is said, the remaining two-thirds from the remaining solvent debtor, and leaving him to his action for contribution against the debtor who had bought his peace; in other words, by permitting the creditor to collect the debt, not directly from the exonerated debtor, but from one who would in turn collect it from him, being substituted for the original creditor, and succeeding even to the equitable ownership of the judgment as a security. It is unnecessary to say how imperfect this would be. It would afford but little gratification to the debtor to know that his money had not gone directly, but circuitously into the pocket of one who had absolved him from the debt. Cases might undoubtedly be put, in which the justice of the rule would be less apparent; for instance, where the outgoing debtor has paid his proportion, as between the debtors themselves. Still there would be a degree of injustice in forcing them to settle nice and complicated equities, (in the present case depending on the winding up of a partnership,) in a proceeding with a stranger, and not between themselves; without which, it would be impossible to ascertain how much might be found for the creditor without jeopardizing the exonerated debtor. In a court, proceeding according to common law forms, this would be impracticable; and, before a jury, even were the judgment as ductile as a decree in equity, intolerably inconvenient. If defendants might be compelled to conduct an underplot among themselves, judicial proceedings would be in perpetual danger of branching into forms too fantastic for use. An engagement to exonerate a joint debtor, therefore, must be made good in the only way known to the law—by relinquishing the debt. It seems to me, then, that the rule has a foundation more solid than the magic [*403] of a seal; and, although there *are dicta*, that it holds only in the case of a technical release, yet, that is said not to distinguish a legal from an equitable release, but to indicate that there must be, not merely a covenant not to sue, which may in some cases be pleaded as a release, but an unqualified discharge from further liability. Now, whatever may be the effect of accepting in satisfaction of the whole, a part of a debt, payable presently, it is unquestionable that prompt payment of part, when the debt was not demandable, is an available consideration even for a promise, and it is quite as certain, that a parol release is effectual in our courts of law. By the way, the judges who decided *Wentz v. Dehaven*, were far from trampling on the common law. It is well known that a majority of them, entertained just notions of its obligation as well as a salutary fear of the evils inseparable from judicial legislation. They but conformed their judgment to a common law principle modified as to circumstances by time, and the intervention of

[Milliken and another *v.* Brown.]

Courts of Chancery. It is a property of this common law, which alone would render it more excellent in practice, than any code of ancient or modern date, that it gradually and imperceptibly yields to the form and pressure of the age, but never to force, without manifesting in the consequences, the violation it has suffered. These remarks are subjoined, not with an expectation that they will add to the argument of Judge Huston, who has satisfactorily stated the grounds of the judgment, but, with great respect for the opinion of Judge Tod, who dissents, to vindicate the rule on which I put the cause to the jury.

Judgment affirmed.

Cited by Counsel, 3 Penn. R. 411, 439; 1 Wh. 395, 342; 5 Wh. 134, 537; 1 W. 199, 498; 8 W. 224; 5 W. & S. 487; 3 Barr, 155; 8 Barr, 266; 10 Barr, 402; 1 J. 314; 1 H. 168; 8 H. 128; 9 C. 269; 3 G. 152; 6 Wright, 163; 3 N. 136; s. c. 4 W. N. C. 31; 11 W. N. C. 389, 390.

Cited by the Court, 1 Penn. R. 381; 5 Barr, 39; commented on and explained, 3 Penn. R. 63, and qualified in 12 Wright, 174; where it is said, "*Milliken v. Brown*, has not been followed."

[SUNBURY, JUNE 15, 1829.]

Barton and Others *against* Smith.

IN ERROR.

It seems that the ninth section of the act of the 8th of April, 1785, requiring that surveys should be made after the warrants are delivered to the deputy surveyor, is not confined to the purchase made of the Indians in 1784.

Independently, however, of legislative enactment, a survey made previously to a warrant, is void; and is not rendered valid by the receipt of the purchase-money and acceptance of the survey.

ERROR to the Common Pleas of *Huntingdon* county, in an ejectment brought in that court, by Elizabeth Barton and others, heirs of William Barton, against Jacob Smith, for a tract of land on the north branch of Little Juniata. Jacob Smith took defence for so much thereof as was included in a survey made for him on the 24th of July, 1807, under a warrant dated February 23d, 1808. The plaintiff's title was set up as follows: On the 1st of February, 1794, William Barton, Esq., their ancestor, took out a number *of descriptive warrants, all [*404] of that date. Surveys were returned, purporting to have been made on the 24th and 25th of May, in the same year, and were accepted in the surveyor-general's office on the

[Barton and others v. Smith.]

29th of April, 1795. The purchase-money was paid on the 14th of June, 1794; but evidence was given to show that the land was surveyed for Mr. Barton before the 19th of April, 1794.

The court charged the jury, that if Barton's surveys were made before the warrants came to the hands of the deputy surveyor, the surveys were void, and that the acceptance of the returns of surveys at the surveyor-general's office was of no effect.

To this opinion the plaintiff's counsel took a bill of exceptions, and the jury having found a verdict for the defendant, a writ of error was taken out by the plaintiffs.

The case was argued in this court on the 14th of June, 1828, by *Miles* and *Blanchard*, for the plaintiffs in error, who contended that the surveys, though made before the warrants came to the hands of the deputy surveyor, were not absolutely void. The act April 8th, 1785, applies exclusively to the purchase made from the Indians in 1784. Several sections of the act have been expressly adjudged to be so applicable. Lessee of *Wright v. Wells*, 1 Yeates, 286; Lessee of *Hubley v. White*, 2 Yeates, 146; Lessee of *Willinck v. Morris*, 3 Yeates, 114; *Woods v. Ingersoll*, 1 Binn. 146; Lessee of *M'Rhea v. Plummer*, 1 Binn. 227; Lessee of *Steinmetz v. Young*, 2 Binn. 520; Lessee of *Harris v. Monks*, 2 Serg. & Rawle, 560; *M'Dowell v. Ingersoll*, 5 Serg. & Rawle, 104; *Reynolds v. Dougherty*, 3 Serg. & Rawle, 325; *Creek v. Moon*, 7 Serg. & Rawle, 334; *Mock v. Astley*, 13 Serg. & Rawle, 382. But still, after a patent, the commonwealth, and all claiming under her, would be estopped. When the commonwealth has thus affirmed the transaction, the reason of the law ceases. The mischief was, that by sham surveys, subsequent *bona fide* appropriations were prevented. *Levinz v. Will*, 1 Dall. 434, gives the sound construction of statutes, which is exemplified in respect to deeds not recorded within six months. They are not void against a subsequent purchaser with notice, because the mischief intended to be remedied does not exist in such a case. The practice in the land office ought to have weight. Contemporaneous construction of statutes should not be departed from. *Graham's Appeal* 1 Dall. 136; *Stoolfoos v. Jenkins*, 8 Serg. & Rawle, 173; *Blythe v. Richards*, 10 Serg. & Rawle, 265. The acceptance of a survey legalizes it. It must be placed on the same footing as the acceptance of a shifted warrant or location. *Diggs v. Downing*, 4 Serg. & Rawle, 350; *Deal v. M'Cormick*, 3 Serg. & Rawle, 349, 350; *Smith v. Fultz*, 4 Serg. & Rawle, 473; *Healy v. Moul*, 5 Serg. & Rawle, 187; *Light v. Woodside*, 10 Serg. &

[Barton and others v. Smith.]

Rawle, 24; M'Dowell v. Young, 12 Serg. & Rawle, 125; Vickroy v. Skelley, 14 Serg. & Rawle, 377.

Potter, for the defendant in error, was desired to confine himself to the question whether the act of April 8th, 1785, extends beyond *the lands purchased in 1784; and he argued, that as the preamble was general, and the mis- [*405] chief general, the remedy must be general. Even under the proprietary government, the warrant must have been in existence at the time of the survey. *Ross v. Evans*, 3 Binn. 50; *Wilson v. Stoner*, 9 Serg. & Rawle, 39, 42; *Mock v. Astley*, 13 Serg. & Rawle, 382, 385. A particular usage has been admitted, 2 Smith, L. 157, but the general rule was as stated, *ib.* 155, 6. In every case where a survey made without authority was afterwards validated by the proprietary officers, they knew of the departure from their orders. But whatever loose practice might have previously prevailed, it was put a stop to by the express regulations of the proprietaries in 1765. He also cited *Sproul v. The Lessee of Plumsted*, 4 Binn. 189; *The Lessee of Brown v. Long*, 1 Yeates, 162; *The Lessee of Bonnet v. Devebaugh*, 3 Binn. 175; Add. Rep. 127; *The Lessee of M'Kinzie v. Crow*, 2 Binn. 105; *Stockman v. Blair*, 5 Binn. 211; *Simpson v. Hall*, 4 Serg. & Rawle, 343; *Bixler v. Baker*, 4 Binn. 214; *The Lessee of Harris v. Monks*, 2 Serg. & Rawle, 557; *Burd v. Seabold*, 6 Serg. & Rawle, 137.

The case was held under advisement until this day, when the opinion of the court was delivered by

ROGERS, J.—Two questions have been presented to the court, which have been argued with great zeal and earnestness: 1. Whether a survey, made before the warrant issues, be void; and, 2. Whether the payment of the purchase-money to the commonwealth, where the warrant issued after the survey, the acceptance of the survey, and the order of the Board of Property of the 20th of April, 1795, validate the title of the plaintiffs. The plaintiffs claim the land by virtue of three warrants, bearing date respectively the 1st of February, 1794. The surveys, which purport to have been made the 24th and 25th of May, 1794, were returned, and accepted in the office of the surveyor-general the 29th of April, 1795. The plaintiffs' ancestor William Barton, paid the purchase-money the 14th of June, 1794, and the surveying fees, as appears by a paper produced at the trial, the 19th of April, 1794. After the verdict, we are to consider it as settled, that the surveys were made before the warrants came to the hands of the deputy surveyor, to whom they were directed. It is contended, that a survey so made, is con-

[*Barton and others v. Smith.*]

trary to the plain provisions of the act of the 8th of April, 1785, and particularly to the ninth section; and, on the other hand, it is insisted, that the act does not apply to this land, but to the purchase of 1784; and, that the payment of the purchase-money, and the acceptance of the survey, estop the commonwealth from denying the plaintiffs' title. There is, perhaps, no absolute necessity of deciding the much agitated question, whether the ninth section of the act of the 8th of April, 1785, be general, or confined to the purchase of 1784. Independently of the doubts expressed by some of our predecessors, for whose experience and judgment, in all things relating to titles *to real estate, [*406] I have the highest respect, I am inclined to believe, the legislature intended to establish a general system, operating alike upon all the lands belonging to the commonwealth. Some of the sections of the act, doubtless have relation merely to the act of 1784: and to me it is equally plain, that others have a much more extensive operation, and this opinion is grounded on the preamble to the act, which is the key to its construction, the import of the sections themselves, the mischiefs which were felt, and were general, and not merely confined to lands within that purchase, and the remedy provided by the legislature. However that may be, yet it appears to me, that independently of legislative enactments, a survey, made previous to a warrant, is void, on general common law principles; because, made without any authority or direction from the government, in whom the power to grant is vested, to the deputy surveyor. The mischief which resulted from surveying lands, without authority, was felt at an early day; for it had the effect of retarding the settlement of the country, an object of primary importance, and defrauded the proprietaries, by preventing the sale of their lands. To remedy the evil, which in practice, prevailed to a considerable extent, as early as the 3d of October, 1765, the proprietary government made an order, by which they expressly prohibited the deputy surveyors from surveying any of the proprietaries' vacant, or unappropriated land whatever, on any ticket or order from any person but the surveyor-general; nor were they to survey any land, unless they had a copy of a regular warrant, or application, numbered, and to them directed by the surveyor-general himself, or by his order. The same policy, and for the same reasons, has been pursued under the commonwealth, as appears from the act of the 8th of April, 1785, and of the 3d of April, 1792. A survey, therefore, after this proprietary order, and in contradiction of the policy of the acts of assembly, without warrant, could produce no benefit to him who acted knowingly against law. Whether under the proprietary government, a sur-

[Barton and others v. Smith.]

vey, although made without authority, returned to the office, accepted, and money paid, with a full knowledge of all the circumstances by the proprietary agents, would give title, may be an inquiry of more curiosity than use, as since the divesting act of the 27th of November, 1779, a different state of things has existed. As the proprietaries were the absolute owners of the soil, with power to dispose of the lands in such manner, and upon such terms as they might deem most advantageous to themselves and the public, a subsequent ratification by them, with full knowledge of the facts, would upon the ordinary principles of principal and agent, cure any irregularity in the sale. The proprietary servants had not merely a limited, but a general authority, which was a power necessary for the correct and proper discharge of their trust; and hence, I believe, there is no instance of their refusing to ratify the acts of their agents, who were in the habit of dispensing with the general rules of the office, where no *injustice had been done, or fraud intended. Hence, [*407] there was an implied understanding, that in the purchase of lands from the agents, the vendees were dealing with the principals, and upon the same terms as if they were personally present. To say, therefore, that the title was not valid, where the survey had been accepted, and money paid, with a full knowledge of all the circumstances, and without any intervening right, would have been a fraud upon the purchasers. But since the revolution, and the subsequent appropriation to the use of the commonwealth of the proprietary vacant land, circumstances have entirely changed. The officers of the land office, under the state government, are as much bound by the acts of assembly, as any other citizens. They derive their authority from the law, which they may construe, but cannot alter. A uniform practice of the land office is a strong evidence of the law, to which the courts have always paid great respect, particularly where a difference in construction, where there is room for it, would unsettle estates; but that they can disregard the plain injunction of an act of assembly, is what cannot be permitted. It is contrary to the theory of our government, that they should have a dispensing power, and in this consists the difference in the usages of the present, and the proprietary government. The court are, therefore, of the opinion, that the survey being made without authority, is void; and, that the receipt of the purchase-money, and the acceptance of the survey, do not render valid the title of the plaintiffs. If Mr. Barton and the officers of the land office acted under a mistake, it is a strong case for relief, by an application to the legislature, who alone can refund the money, or cure the defect of title. The legislature alone, stand

[Barton and others v. Smith.]

in the place of the proprietaries, with full power to relieve the plaintiffs, if they have sustained injury.

Judgment affirmed.

Cited by Counsel, 13 N. 103; s. c. 9 W. N. C. 305.

Cited by Court, 23 S. 320.

Commented on in *Fox v. Lyon*, 3 C. 16, where it is asserted that it is no authority for the doctrine that a record of the land office can be contradicted by parol.

[*408]

*[SUNBURY, JUNE 15, 1829.]

Brown *against* Dysinger and Another.

APPEAL.

Parol evidence of declarations, made by a purchaser at sheriff's sale, that he was bidding for another, is admissible to establish a trust for the person for whom the purchaser declared he was bidding.

A tender of money in behalf of an infant, made by his uncle, the father being dead, but the mother living, held to be good, although the uncle had not then been appointed guardian.

A tender, partly in silver coin, and partly in bank notes, offered to be converted into silver, but the opposite party refusing to accept any money, held to be good.

The words "any earthly property," in a will, if they appear from the context not to have been intended to include real estate, will be confined to personal property.

If a naked power to sell be given to executors, the land in the meantime descends to the heir, and an ejectment may be brought for it in his name.

A lease, unfairly obtained from a party in possession of the land, will not prevent the lessee from contesting the title of the lessor.

APPEAL from the decision of a Chief Justice, at a Circuit Court held for *Mifflin* county in April, 1829.

Ejectment for a tract of land, claimed by Samuel Brown, a minor, suing by his guardian, William Brown, as heir at law to his father, Samuel Brown, against Jacob Dysinger and David Walker.

On the trial it appeared, that the premises in question having been taken in execution on a *levari facias* against Daniel Shortel, were exposed to sale by the sheriff, when David Walker, one of the present defendants, publicly declaring, that he was bidding for Samuel Brown, (the father of the plaintiff, who was an infirm man, in poor circumstances, and at the time resident on the land,) became the purchaser for the sum of nine hundred dollars. That sale, however, was set aside on some ground, not material to the present controversy, and a second sale afterwards took place, when David Walker repeated the public declaration, that he was bidding for Samuel Brown, and again became the pur-

[Brown v. Dysinger and another.]

chaser for ten hundred and fifty dollars. A deed was executed to David Walker by the sheriff, bearing date November 22d, 1822.

The plaintiff's counsel called William Zeigler, to prove the declarations made by David Walker at both the sales, to which the defendants' counsel objected, but the court, on argument, permitted the evidence to be given; and after examining Zeigler, and several other witnesses to that point, a tender of the purchase-money, with interest, was proved to have been made to Walker, by the uncle of Samuel Brown, who was not then his guardian, though subsequently appointed by the Orphans' Court. The mother of Samuel *Brown was then living. The tender was made partly in bank notes and partly in [*409] silver coin. Walker refused to receive it; saying, that paper money was no better than rags. The uncle offered to convert it into money, but David Walker still refused. The defendants gave evidence to disprove that of the plaintiff, in regard to the transactions at the time of the sale, and further gave in evidence the will of Samuel Brown, which, so far as is material to the explanation of this case, was in the following words:—

“Respecting any earthly property which God hath been pleased to give me, and which I may own at the time of my dissolution, I order as follows, viz.—That all my property be brought to public sale as soon after my death as may be deemed proper, and all my just debts paid out of the proceeds thereof, after discharging the funeral expenses, and the remainder to be appropriated to my dearly beloved wife Agnes, and now surviving child, Samuel, if any remain; and do appoint my beloved wife and Calvin Blythe, Esq., to be the executors of this my last will, and that it may be executed according to the genuine intent thereof. In witness,” &c.

They likewise gave in evidence a lease of the premises from David Walker to Samuel Brown, dated December 30th, 1822. The plaintiff, to rebut the last mentioned evidence, called a witness, to show, that David Walker had threatened to turn Samuel Brown out of possession, if he did not execute the lease: That Brown was then very sick with a consumption, and died some time in the following month of August.

The jury, under the direction of the court, found a verdict for the plaintiff, and a motion for a new trial on the part of the defendants being denied, the present appeal was entered. The reasons filed in support of the motion were as follows:—

“1. Because the court admitted the parol evidence offered by the plaintiff, contrary to the provisions of the statute of frauds and perjuries.

[*Brown v. Dysinger and another.*]

"2. The court erred in the construction of the will of Samuel Brown, in deciding, that the plaintiff was entitled to recover.

"3. The court erred in deciding, that this case was not within the statute of frauds and perjuries.

"4. The court erred in deciding, that William Brown had authority, on the 3d of January, 1824, to make a tender to David Walker for Samuel Brown, a minor.

"5. The court erred in refusing to instruct the jury, that the acceptance of the lease given in evidence, by Samuel Brown, the father of the plaintiff, was a release and abandonment of his claim, under the alleged parol contract.

"6. That the verdict is against the law, the evidence, and the justice of the case.

"7. That the tender in bank notes was not such a tender as would entitle the plaintiff to recover."

The argument was conducted by *Potter* and *Blythe*, for the [*410] *appellants.—The first and third exceptions may be taken together. They present the main question. The act of March 21st, 1772, for the prevention of frauds and perjuries, is explicit, that no estate in lands greater than a lease, not exceeding three years, can be created otherwise than in writing. No parol declarations of trust in the case of a larger estate are of any value. It is, however, admitted, that there are two exceptions. 1. The case of a resulting trust; and 2. The case of fraud. By a resulting trust, we understand a purchase by A. with the money of B. If A. takes a conveyance of the legal estate to himself, and it is clearly and unequivocally proved, that the purchase was made by him with the money of B., he becomes the trustee of B. without any written acknowledgment or declaration of the trust. But this was not the case in the present instance. Walker had no money of Samuel Brown's in his hands. Brown was a poor man. Walker had no claim on him to furnish the amount paid to the sheriff, by way of reimbursing himself for the purchase; and if he had possessed any evidence to charge Brown, the latter was unable to raise the money. The great rise in the value of the property has led the friends of the minor to come forward, after the death of the father, make a tender, and bring the ejectment.

It is not a case of fraud either in fact or law. The case of *Thompson's Lessee v. White*, 1 Dall. 424, which will be cited against us, was one of plain fraud. To induce the wife to execute a deed, the husband made the most solemn promise, that he would by will or otherwise, settle an estate in a manner previously agreed upon, calculated for the benefit of the wife's relations. The husband, surviving the wife, retained the prop-

[Brown v. Dysinger and another.]

erty as his own, and died without making such provision. This was a direct fraud upon the wife and those who were intended to take after the husband's death. But what fraud in respect to Brown can be found in the conduct of Walker? Did Brown contemplate bidding himself, and was he prevented from doing so by the declarations supposed to have been made by Walker? If Walker had not bid at all, would Brown have been a sufferer? Would he have sustained any loss whatever? How then can he or his heir be received at a distant time to gain by an act, the total omission of which would have been no loss to him? The conveyance of the sheriff to Walker, to his own use, in fee, was an act of legal notoriety, and amounted to constructive notice to Brown that Walker took an absolute estate himself: but he makes no application to the court, nor personally to Walker to have his imaginary trust declared. So far from it, that, on the 30th of December, about six weeks after the sale, he takes the lease of the very land in question from Walker. This forms our fifth exception, and it is conclusive. It is impossible to suppose that Brown had the most remote idea of the land belonging to himself, when he thus acknowledged himself to hold it as the tenant of Walker. The evidence, which in all cases where an attempt is [*411] made to raise a trust by parol, ought to be full, clear, and above all doubt, was confused and unsatisfactory as to the declarations of Walker, particularly at the second sale. (The counsel on both sides remarked minutely in the testimony.) But were we to give the fullest effect to the plaintiff's testimony on this head, it could not amount to more than a contract on the part of Walker; for the breach of which, Brown, if he could make out his case, would be entitled to recover damages. *Hughes v. Moore*, 7 Cranch. 176; *Crop v. Norton*, 2 Atk. 74; 1 Bro. Ch. Ca. 92; 2 Johns. Ch. 409; 2 Mad. Ch. 108, 109; *Wallace v. Duffield*, 2 Serg. & Rawle, 526; *Jones v. Peterman*, 3 Serg. & Rawle, 546. On the fourth exception, they denied the validity of the tender made on the 3d of January, 1824, by William Brown, the uncle of Samuel Brown. No person had, at that time, been appointed by the Orphans' Court guardian of the minor. The mother, the natural guardian, was living. The uncle was appointed guardian by the Orphans' Court on the twentieth of the same month. Till then, he had no authority to act on the part of the minor. The tender, therefore, was the act of a stranger, and could not inure to the benefit of the infant. He might have disclaimed it when he attained full age. It did not perfect his supposed equitable interest as heir of the *cestui que trust*, and, therefore, he cannot support an ejectment. The

[Brown v. Dysinger and another.]

tender itself, being partly made in bank notes, was of no effect, by whomsoever it was made. Under the second exception, it was argued, that the ejectment ought to have been brought in the name of the executors of Samuel Brown, and not in the name of the minor. "Any earthly property I may own, &c.," is to be construed like the word "estate," in other wills, or "my lands." The power to sell, given to the executors, vests the interest in them for the purpose of sale. 7 Cranch, 176.

To these arguments it was answered by *Blanchard* and *Hale*, that the case must be decided on other principles than those which apply to resulting trusts. Fraud, either in fact or in law, will create a trust; and the fraud may be, and frequently can only be proved by parol testimony. He who has committed the act which constitutes the fraud, will never be permitted to shelter himself under the same act. Here Walker came forward as the public and avowed bidder for Brown. The bids were thus the bids of Brown, and the purchase was the purchase of Brown. A sense of humanity, a desire not to put to inconvenience a sick man, residing on the premises, must have had an effect on the by-standers; and if the premises were consequently sold even to a small amount below their real value, it was fraud in Walker, after playing such a trick, to avail himself of its success, and take a title to his own use. The case is quite as strong as that of the husband in *Thompson's Lessee v. White*. To this point they cited *Gause v. Wiley*, 4 Serg. & Rawle, 539; 1 Sm. L. 381; *Stewart v. Brown*, 2 Serg. & Rawle, 461; *Gregory's Lessee v. Setter*, 1 Dall. 193; *Lessee of German v. Gabald*, 3 Binn. 302. The first and third exceptions cannot, therefore, be sustained. The second applies to the construction of the will. Whether the words, "any earthly property," include real estate, is immaterial. A naked authority to sell all that the testator orders to be sold, is alone given to the executors. The real estate, in the meantime, descends to the heir at law. But, the other parts of the will sufficiently indicate, that he was speaking only of personal estate. The action was rightly brought in the name of the heir. In regard to the tender, (fourth exception,) it was made by the uncle as next friend to the infant; and, in point of law, he was more properly to be considered such than the mother. He had also a contingent interest as next heir to his nephew, which the mother was not. If a proper tender is made on behalf of an infant, in a case where, if of a full age, he would acquire or confirm a right by a tender, it shall never be inquired by whose hands it is made. *Johnston v. Gray*, 16 Serg. & Rawle, 366. Walker

[*Brown v. Dysinger and another.*]

did not object to the tender, because it was made by a person not regularly appointed guardian, nor because it consisted in part of bank notes, but absolutely refused to receive any money on account of the transaction, persisting to hold the land.

The validity and effect of the lease, which form the subject of the fifth exception, were left to the jury under all the circumstances of the case; and, they have found it not to be a waiver of the rights of Samuel Brown. Their verdict was just. It has been decided, that the general rule which precludes a tenant from disputing the title of his landlord, does not apply where the lease has been obtained by misrepresentation or fraud. *Miller v. M'Brier*, 14 Serg. & Rawle, 382. Here, it was a part of the system of fraud, which tintured the whole of the transaction on the part of Walker, to present himself to Brown as the legal owner of the land, and to threaten him with expulsion if he did not execute the lease. *Robinson v. Eldridge*, 10 Serg. & Rawle, 140. On the whole, it was contended, that the verdict was consistent with natural, and technical equity, and ought not to be disturbed. 1 Smith's Laws, 391; 1 Dall. 193.

The opinion of the court was delivered by

SMITH, J.—This was an ejectment for a tract of land in Mifflin county, alleged to have been purchased by David Walker, the defendant, for the use of the plaintiff, in which both parties claimed under the same title. The cause was tried before Chief Justice Gibson, on the 15th of April, 1829, when a verdict was passed for the plaintiff, and a motion for a new trial was overruled; whereupon, the defendants appealed to this court. Seven reasons are assigned for a new trial, of which the first, third, and sixth, may be considered together. The substance of these reasons is, that the parol evidence admitted, was contrary to the provisions of the statute of *frauds and perjuries; that the court erred in deciding, that the case was not within [*413] that statute; and, that the verdict was against the law, evidence and justice of the case.

It is alleged, that the difficulty in this case arises from our act of assembly for the prevention of frauds and perjuries, in which it is declared, that no interest in lands shall pass, but by deed or note, in writing; and, it is contended, that no parol proof can be admitted to contradict, add to, diminish, or vary a deed or writing; that, although there are exceptions to the rule, and cases may be found, in which parol proof has been received, notwithstanding deeds had passed between the parties; yet, the proof offered and given in this case, is not within the exceptions, nor the decisions of those cases; because, the parol evidence,

[*Brown v. Dysinger and another.*]

directly contradicted the sheriff's deed to David Walker ; and in short, that the evidence of the parol agreement set up, was not full and explicit.

This testimony, on a fair and candid examination, will not, I apprehend, be found liable to these objections. The witnesses have stated explicitly, that, at the sale, David Walker declared he was buying the land for Samuel Brown, and at different times, after the sale, said he had bought it for him ; that when the crier asked him for the customary fee on sales, he declared that he had bought for his friend Samuel Brown, whose circumstances he knew, and therefore, should not ask the fee, and that this took place at the second sale. It also appeared, that Samuel Brown was a sickly man, and was so long before, and at the time of the sale. From James Kinsloe's testimony, it appeared, that one Myers was bidding for the land at the first sale ; at which time, David Walker and the witness stated to Myers, that he, David Walker, was bidding the land in for Samuel Brown ; that on this, Myers ceased to bid, and shortly after, the land was struck off to David Walker. Other witnesses proved, that David Walker declared he was buying the land for Samuel Brown. And William P. Elliot says, he thought, though he was not certain, it was entered on the sheriff's list, "bought by Walker for Brown." The question then is, whether the engagement of David Walker, concerning this land, although not in writing, is made void by our act for preventing frauds and perjuries ; which, in fact, was, and is the turning-point of the cause. We are of the opinion that it is not, and that the parol evidence was properly admitted by the Chief Justice on the trial of the cause. The object of the act was, the prevention of fraud ; and, to allow it to be interposed as a bar to the performance of this parol engagement, would, in my opinion, encourage the very mischief which the legislature intended to prevent. David Walker, at the sheriff's sale, declared, again and again, that he purchased for Samuel Brown. Although he afterwards obtained a deed for the land from the sheriff to himself ; yet, in equity, he was, under the circumstances, a trustee for Samuel Brown, for the engagement he had made inured to Brown's benefit ; and to this effect is the decision in the case of **Stewart v. Brown*,

[*414] 2 Serg. & Rawle, 461. To me it is evident, that the conduct of David Walker, was calculated to do an injury to Samuel Brown, inasmuch as it prevented others from bidding and purchasing ; for his declarations clearly led those inclined to purchase, to believe he was acting for a poor man, that he was buying for him, and not for himself. No doubt Samuel Brown was induced by David Walker to rely on him, and, therefore, did not take any other steps to secure the land, and David Walker

[Brown v. Dysinger and another.]

should not reap the benefit of such conduct ; nor can he, for a trust thereby arises to Samuel Brown, for whom he becomes a trustee. To decide otherwise, and allow him to hold the land, under such circumstances, would be supporting a breach of trust, and a fraud in law. See 4 Serg. & Rawle, 539, 540, and 570.

But, in addition to all this, it appears, that Samuel Brown was sickly, poor, and wholly unable to purchase himself ; he therefore entered into an arrangement with David Walker, to purchase the land for him. To this, Walker freely agreed, and I believe at the time, fairly and honestly, intended to live up to the arrangement. Shall he, when Samuel Brown is dead and gone, be permitted to say, "I did not so purchase, I am not a trustee for him?"—The first sale was set aside, and some time elapsed before the second sale. David Walker, at the second sale, declared again, that he was purchasing for the use of Samuel Brown ; he therefore must have considered the first arrangement in full force at the time ; and immediately after this sale, we find, Samuel Brown claimed the land as his. If then both parties considered the arrangement in full force at the second sale, I am at a loss to discover any difficulty in this case ; but must say, that the jury were right in finding for the plaintiff, and thereby declaring that David Walker, the purchaser, notwithstanding he has the legal title, is a trustee, holding for Samuel Brown. If David Walker did not act, and purchase for Samuel Brown, I would ask, how are we to account for his repeated declarations ? Were they merely made to prevent others from bidding, and enable him to purchase the land for his own use, as cheap as possible ?—And if so, shall he be the gainer, and reap the benefit of this deception, by appropriating the land to himself ?—This would be unjust and fraudulent. Such conduct would, in the language of the Chief Justice, stop his mouth ever after, from asserting anything, contrary to what he declared at and after the sale. David Walker ought to set this matter right ; he has the opportunity of doing so, by conveying the land to the plaintiff, and taking from the office his money tendered to him ; if he does not, he may be compelled to set it right, under the equitable powers of our courts of justice.—A majority of the court are of the opinion, that the parol evidence was properly received, and that there was proved not only a fraud in David Walker, but a trust which, though not declared in writing, was valid, notwithstanding the act of frauds and perjuries. The verdict then was not against the law, *the [*415] evidence, and the justice of the case, and a new trial was properly refused.

But it is said, (in the second reason for a new trial,) that the court erred in the construction of the will of Samuel Brown.

[Brown v. Dysinger and another.]

It is contended that Samuel Brown's estate or interest in this land, if he had any, by his will, vested in his executors ; that his intention was to dispose of all his estate ; that the words "all my earthly property," were sufficiently large to include real estate ; and, that therefore his executors should have sued. It is true, the word "property," may sometimes include land. 6 Serg. & Rawle, 456. But in this will, there was no direction to sell the land, and, therefore, there is nothing to prevent the heir from suing. I think the word property was not intended to include land, because, there are in the will no words of inheritance or perpetuity, applicable to the land ; and it will not do to disinherit the heir by mere implication or presumption. 2 Binn. 20 ; 3 Binn. 488. Here it is evident, it was intended to include personal property only, and the intention of the testator must govern. This objection to the verdict is therefore not sustained.

The fourth and seventh reasons, assigned for a new trial, will be considered together. It is alleged, that the court erred in deciding, that William Brown had authority, on the third of January, 1824, to make a tender to David Walker for Samuel Brown, the minor. It is true, he had not at that time been legally appointed the guardian of the minor ; but he was his uncle, and surely one so near in blood may lawfully interpose as his next friend. We think an infant ought not to lose his inheritance, merely because he has no guardian ; his uncle or next friend may act for him ; he did so here ; the tender by him was well made. But it is said it was in bank notes, and therefore not legal. It was partly in bank notes, but the uncle offered to exchange them for silver :—Walker thereupon refused, and said he would have none of it ; so that after such a declaration, it was not necessary to do more, and the tender was good and sufficient.

In the last place (the fifth reason), it is contended, that the acceptance of a lease by Samuel Brown from Daniel Walker, was an abandonment of his claim. However strong this circumstance may appear, it is to be remembered, that it was contended on the evidence in the cause, that the lease was improperly obtained, and at a time when Samuel Brown, in his then state could not refuse to sign it. Whether it was so obtained, was submitted to the jury with all the facts attending it ; the jury have passed on it, and found it under the circumstances, not to be a waiver or abandonment of right. I think the submission to the jury for their decision was correct. A tenant may impeach his landlord's title, if induced to take a lease by misrepresentation and fraud. *Miller v. M'Brier*, 14 Serg. &

[*Brown v. Dysinger* and another.]

Rawle, 382, and *Hamilton v. Marsden*, 6 Binn. 45; [*416] *in which case it was held, that the lessee might contest the title of the lessor, where he threatened to turn the lessee off, if he did not take a lease. By the verdict in the case before us, the lease was impeached. We have then presented to us, the case of an agent of a poor and sick man, conducting, if not in bad faith, at least fraudulently in law: we see a trust proved, and a legal fraud in the agent, and we are called upon, to pronounce the operation of the law in such a case. Our answer is, that David Walker should transfer the land to the plaintiff according to the trust. If this be refused, it is in this state to be enforced by an ejectment; for having no court of equity, we consider that as already done, which in equity, ought to have been done; and therefore, in a case, in which a court of equity would decree a trust, or direct a conveyance, the courts of this state, with the aid of a jury, will enforce the same by a recovery of the land in an action of ejectment. I refer to *Stewart v. Brown*, 2 Serg. & Rawle, 461; *Vincent v. Huff*, 4 Serg. & Rawle, 298; *Gause v. Wiley*, 4 Serg. & Rawle, 538, and *Peebles v. Reading*, 8 Serg. & Rawle, 484. The motion for a new trial is therefore denied, and the judgment of the Circuit Court affirmed.

TOD, J., dissented, and delivered the following opinion:—I do not take it to be at all material in the present case, that the fourth section of the British statute of frauds and perjuries is omitted in our act of assembly; for it is not damages, that are now demanded for non-performance of an alleged parol contract; but the plaintiff sues by ejectment, claiming possession of the land itself, and alleging an actual transfer of the title.

Beyond a doubt the words of the act of assembly are clear and positive against the plaintiff, but for a long course of years, perhaps from the date of the British statute, parol titles, created under certain particular circumstances, have been sustained by the rules of equity against the strict words of the law, by a train of decisions sanctioned sometimes by legislative authority, so that there are now admitted decided exceptions, as well known as the law itself. But it certainly has for many years past been usual for courts of justice to regret, that these exceptions were ever made from the statute by construction, and to declare that under no pretence whatever, should any new exceptions be introduced.

In my opinion, most clearly the Chief Justice was right in admitting the evidence as offered. But after the whole evidence had been heard, was it such as to take the case out of the statute, and give a title to land: or in other words, the jury hav-

[*Brown v. Dysinger and another.*]

ing upon such proof found a verdict for the plaintiff, ought the court now to interfere and set aside the verdict? Has the parol title here been made out by proof so unexceptionably clear, as to bring the case within any of the established exceptions to the statute?

[*417] *I must say, that to me the verdict appears to be decidedly against the weight of evidence. The testimony is by parol throughout. There is no part performance: no fact: no one single act done, or offered to be done by Walker, or by Samuel Brown, Jr. Mere words spoken, which in their own nature are so exceedingly easy to be mistaken or perverted, form the whole of the plaintiff's title in this ejectment.

Whatever there is of fraud or trust in the case upon which Brown's equitable claim is supported against the legal title of Walker, depends upon four witnesses, Zeigler, Kinsloe, Elliot and Warwick. These four principal witnesses were called by the plaintiff, and one witness by the defendant. To show how little dependence is to be put upon the remembrance of words spoken relative to contracts for real estate, it happens that the plaintiff's witnesses agree neither with the defendant's witness, nor with each other. Zeigler and Elliot, concur in stating that Walker repeatedly declared that he was buying the land for Brown; but the only circumstance which makes this evidence of any use in the case, viz., that these declarations were at the time of the second sale by the sheriff, is positively denied by Kinsloe, who swears that all those declarations by Walker, were at the first attempt to sell, one full year before, and that not one word was uttered upon the subject at the second sale. Kinsloe adds further a most material fact, that one condition of Walker's promise at the first sale was, that a debt due from Brown to Walker was to be let in, as the witness called it, and paid. Kinsloe swore also that there was an express exception of a few acres, how many he did not say, for Nancy Ferguson near the still house, stating the reasons for the exception. Warwick, the fourth of the plaintiff's witnesses, who was present at the second sale, proves these words by Walker. "I intend to give it to Brown, and I intend to let Kinsloe have a chance of the part he is concerned in; and I will reserve a part for Nancy Ferguson." On cross-examination, Warwick stated further, that Walker at the same time complained that Brown had disappointed him in money, but the witness could not recollect the particulars.

Curran, the defendants' witness, states a material fact, unsaid by any of the rest, that another condition of the arrangement at the first sale was, that Brown was to pay down four hundred dollars, and this is strongly confirmed by Kinsloe, stating that Walker was not to lay out his own money.

[Brown v. Dysinger and another.]

Clearly, if any single fact is well made out by the evidence, it is that some reservation was intended for Nancy Furguson. But without any notice of the positive exception on her behalf, the jury have awarded the whole tract to the plaintiff directly against his own proof.

Curran and Kinsloe, were the only witnesses who ever saw Walker and Brown together conferring upon the subject of the land. They both prove some essential previous conditions *which the plaintiff did not pretend were per- [*418] formed. There is nothing improbable in what they swore. The reverse would seem to be absolutely incredible. Yet the jury would appear to have totally disregarded the only witnesses who were present when the two parties were together, and who, if a parol bargain existed, could be able to state the terms of it with any correctness. The jury have depended rather upon loose accidental expressions, uttered without connection or meaning as far as the full terms of a contract are necessary to understand the meaning of it; and of all the witnesses who prove these loose uncertain expressions only one of them, Elliot, has thought it material to mention that Walker was intoxicated at the time.

It is an established rule of chancery never to decree against the words of the statute of frauds, in any case whatever upon mere parol proof, where that proof is contradictory. *Rowton v. Rowton*, 1 Hen. & Munf. 91.

My impression is, that the plaintiff could not recover the land, even if the statute of frauds were not in his way. But under that statute, beyond a question, the verdict appears to me to be wrong. There is in the case no part performance, nor the pretence of it. But, it is argued at bar, here is a trust, a fraud, which I deny, if by trust and fraud, are meant the same things that are meant by those words in a court of equity. Such a trust is not, as far as I can discover, to be found in any chancery proceedings, as that of a man having purchased a legal title to land in his own name, with his own money, being called on and enforced to convey to another, by parol proof of a bare promise without consideration, the merest *nudum pactum*, in favour of one whose sole interest in the title was what the promise created. There appears no more fraud here than what is implied in every non-performance of a promise. An action at law could not, I think, be sustained for damages for breach of such engagement. And as to chancery, it is laid down that even before the statute of frauds, equity would not execute a mere parol agreement not in part performed. *Sugden on Vend.* 86.

That a gratuitous promise will not support a bill in equity,

[*Brown v. Dysinger and another.*]

any more than it will an action at law is shown by 3 P. Wms. 131, 317; 1 Vern. 12; 1 Ves. 507; 2 Ves. 310, 547; 7 Johns. Rep. 207, 332; 10 Johns. 246, 594.

There are many authorities which, in my opinion, would clearly show that the present case is not one calling for equitable relief against the words of the statute. 1 P. Williams, 771; 5 Mass. 133; 1 Dessaus. 289; 9 Mass. 510, 533; 11 Mass. 342; 15 Mass. 85; 16 Mass. 221; 4 Cranch, 235; 5 Johns. Rep. 272; 1 Root, 59, 549; 3 Johns. Rep. 216; 7 Cranch, 176; Prec. Chancery, 69; Smith L. 393, notes.

But the main thing in the case is the inconclusiveness of the proof. Even Brown himself, though he lived for about a year after Walker's deed from the sheriff, and during nearly the [*419] whole *of that time appears to have been in full possession of his faculties, and attending to his business; and though two or three witnesses swear to his declarations relative to the land, yet, during all that time, there is not the least evidence, that he alleged any trust or charged David Walker with any fraud, or pretended to have any shadow of title to the land; but, on the contrary, took a lease for a year on the shares, binding himself to keep up the fences, and restore the possession.

This lease would, I apprehend, amount to a discharge and surrender of parol claims to the land, if he had any. It is argued, that this coming under lease must have been compulsory. There is no proof of compulsion, nor to my mind, any probability of it; for the man's last will, drawn apparently with the utmost care and minuteness, and specifying some of the smallest articles of personal property, yet mentions not a syllable about the plantation of which this verdict says he was then the owner of.

If the statute of frauds cannot protect David Walker in his legal title, there seems one peculiar hardship in his case. In England, and in all those states in which courts of equity are established, the man whose freehold is attacked by parol proof and alleged promises, would generally have the privilege to be himself sworn, and on his oath to contradict or explain the evidence. But by our mode of proceeding in Pennsylvania, Walker's mouth is closed. So, that a witness who arrives at the middle of a conversation, may be sworn as to one-half, without the right of the defendant even to state to the jury what the other half was. In my opinion, the parol proof which is to dispense with the statute of frauds, ought to be stronger and clearer here than in any country where they have a special chancery jurisdiction. The verdict being, as I

[Brown v. Dysinger and another.]

think, decidedly against evidence and law, I am for setting it aside, and awarding a new trial.

ROGERS, J., and HUSTON, J., were absent.

Judgment affirmed.

Cited by Counsel, 1 Penn. R. 392, 405; 2 Wh. 468; 3 Wh. 491; 6 Wh. 239; 5 W. 389; 6 W. 130, 138; 8 W. 50; 5 W. & S. 432; 2 Barr, 123; 12 H. 110; 1 C. 66; 5 C. 250; 7 C. 518; 11 C. 109; 2 G. 108; 3 S. 149; 19 S. 446; 21 S. 270; 14 N. 382; 4 O. 3; s. c. 11 W. N. C. 318; 5 O. 68.

Cited by the Court, 2 W. 325; 6 W. 322, 341; 9 W. 36; 1 H. 455; 9 C. 165; 23 S. 301; 1 N. 464.

Explained in 10 W. 320, and said the declaration of a vendee at sheriff's sale that he is purchasing for another, will not create a resulting trust unless there is "*mala fides*," which doctrine is approved in, 6 H. 128.

In 19 S. 88, WILLIAMS, J., makes this comment on the principal case: "There a purchaser at sheriff's sale openly declared that he was bidding the property for the plaintiff's ancestor, who subsequently took from him a lease of the premises, and it was held that whether his acceptance of the lease amounted to a waiver and abandonment of his claim, was properly left to the decision of the jury. Though this case has been greatly criticised on other grounds, and the dissenting opinion of TOD, J., is now regarded as a sounder exposition of the law arising on the facts of the case than the opinion of the majority, yet its ruling in this respect has never been doubted, &c."

*[SUNBURY, JUNE 15, 1829.]

[*420]

Williams, Executor of Pennock, *against* Carr and Another.

IN ERROR.

Where a *feri facias* has lain in the sheriff's hands six years, and is then returned *nulla bona*, such return will not preclude the admission of evidence to contradict it.

A court, in submitting presumptive evidence to the jury, may give its opinion on the weight of the testimony, but cannot preclude the jury from deciding for themselves.

The party who requests an opinion from the court, on the effect of testimony, cannot assign for error a compliance with his request.

ERROR to *Lycoming* county.

The facts of this case are so fully set forth in the opinion of the court, delivered by SMITH, J., that it is unnecessary to give any other statement of them.

Anthony and *Bellas*, who appeared for the plaintiffs in error, cited the following authorities:—*Phillips v. Hyde*, 1 Dall. 439; *Shewell v. Fell*, 3 Yeates, 17, 18; 4 Yeates, 47; *Selin v. Snyder*, 7 Serg. & Rawle, 172; *Blythe v. Richards*, 10 Serg. & Rawle, 261; *Hunt v. Bredding*, 12 Serg. & Rawle, 37; *Diller v.*

[Williams, Executor of Pennock, v. Carr and another.]

Roberts, 13 Serg. & Rawle, 60; 6 Com. Dig. Return, G.; 4 Mass. Rep. 478; 11 Mass. 163; 20 Johns. 49; 4 Am. Dig. 66, pl. 713; 1 Pick. 271.

Greenough, for the defendants in error, cited 2 Tid. Pr. 1047; 10 Mass. Rep. 101; *Wiedman v. Weitzel*, 13 Serg. & Rawle, 96.

The opinion of the court was delivered by

SMITH, J.—George Pennock, deceased, in his lifetime obtained, on the 5th of December, 1798, a judgment in the Court of Common Pleas of Lycoming county, for one hundred and thirty-nine pounds twelve shillings and nine and a half pence, with interest from the 12th of April, 1798. A *fiery facias* was issued thereon, returnable to the September Term, 1799, and was returned "*nulla bona*." An *alias fiery facias* issued to February Term, 1800, to which the sheriff, on the 12th of February, 1806, returned "*nulla bona*." To the September Term, 1805, a *pluries fiery facias* was issued, and levied on three hundred acres of land in Bald Eagle, belonging to the defendants. This land was afterwards sold by the sheriff on another judgment; but before the money was appropriated to the creditors of the defendants, the latter moved the court, that the judgment of George Pennock's executor, of the 5th of December, 1798, above mentioned, be opened, so far as to let them plead and try what sum, if any, was due to the plaintiff in that judgment. On the 3d of September, 1825, the court granted this motion. The defendants pleaded payment with leave, &c. Re-
[*421] plication, **non solverunt*, issue and rule for trial. The trial came on in December, 1825, and a verdict was found for the plaintiff for two hundred dollars and ninety-one cents, upon which judgment was rendered by the court. On this trial, the plaintiff proceeded to give in evidence his judgment of the 5th of December, 1798, and the two first writs of *fiery facias*, above mentioned, with the sheriff's returns thereon, and rested.

The defendants then offered in evidence a judgment of Johnson against Griffith Carr and George Carr, September Term, 1798, for one hundred and nine pounds nineteen shillings and four-pence, together with a *fiery facias* issued thereon, returnable to December Term, 1799, and returned "levied on grain in the stack subject to former levies;"—an *alias fiery facias* to December Term, 1800, returned, "levied on three stacks of wheat, and one yoke of oxen; the oxen subject to former levies;"—a *venditioni exponas* to February Term, 1801, returned, "sold to the amount of sixty-six dollars," returned February, 1806;—an

[Williams, Executor of Pennock, v. Carr and another.]

alias venditioni exponas to May Term, 1801, returned, "sold, and proceeds appropriated to prior levies;"—a *fieri facias* to February Term, 1805, *pro residuo*, returned, "levied on two horses;"—a *venditioni exponas* to April Term, 1805, to which there was no return;—an *alias venditioni exponas* to December Term, 1805, returned, "sold to the amount of forty-seven dollars;"—a *capias ad satisfaciendum* to February Term, 1806, returned, "C. C.;"—and also, the following receipts, admitted to be in the handwriting of J. Cummings, sheriff, viz.: Receipt, 21st of January, 1801, of John Cummings, sheriff, for sixty-nine dollars, for three horses to William Martin, purchased by him as the property of G. and G. Carr.—Receipt of the 23d of June, 1801; same to John Fleming, Esq., for one hundred and thirty-one dollars, in full of the purchase of a mare, sold as the property of the same.—Receipt of the same date; same to Jesse Hunt for twenty-five dollars, in part of two horses, property of the same.—Receipt of the 2d of February, 1801, same to same, for fifty-three dollars and fifty cents, in full for his purchase of Carr's property.—Receipt of the 7th of May, 1801; same to M'Laughlin for sixty-six dollars for property of Carr's, at sheriff's sale; and also, a receipt of the 8th of May, 1800, in the receipt book C. of J. Cummings, of Charles Hall, for three pounds, being the amount of attorney's fees in this case.

The above were offered by the defendants, in order to show, that while the aforesaid *fieri facias* of George Pennock against Griffith Carr and George Carr, to the February Term, 1800, lay in the hands of the sheriff, and when there was no other *fieri facias* in his hands, several executions were put into the sheriff's hands, on which levies were made, subject to former levies; that the property on writs of *venditioni exponas* in the several cases, was sold and returned as applied to prior levies; that there was no prior levy, *unless one had been made on Pennock's *fieri facias* of February, 1800; and, [*422] further, on the return of "sold, and proceeds appropriated to prior levies," made on No. 9, of February, 1801, and No. 27, of May Term, 1801, to prove by the said receipts of sheriff Cummings to persons who purchased at said sales, that the property sold amounted to above three hundred and forty dollars; and further to show, by the receipt of Charles Hall, Esq., above stated, the payment of his fees in this case.

To this evidence the plaintiff objected, but the court admitted it, and sealed a bill of exceptions. Other evidence was afterwards given by the defendants; a second bill of exceptions was sealed, and various errors have been assigned as existing in the charge of the President; but, in the discussion before this court, two errors only have been insisted on. Of these, the

[Williams, Executor of Pennock, v. Carr and another.]

first was the admission of the evidence contained in the foregoing offer.

1. The ancient mode of relief against unjust and oppressive proceedings upon a legal and regular judgment, was by the writ of *audita querela*, which seems (says Blackstone, 3 Com. 406), to have been invented, lest in any case there should be a defect of justice, where a party who has a good defence, is too late to make it in the ordinary forms of law. It lay wherever a defendant had paid the debt to the plaintiff without procuring satisfaction to be entered on the record, or has matter of fact or in writing, to avoid the execution, and no other means to take advantage of it. 1 Com. Dig. Aud. Quer. A. 647. In such cases, the defendant was aided by this writ, which, in the nature of a bill in equity, lay upon good matter of discharge occurring since the judgment, to relieve him against the oppression of the plaintiff. The modern practice of granting relief upon motion, has been found to be more convenient, and has accordingly superseded the writ of *audita querela*; being adopted in all cases, where the defendant would have been entitled to relief upon that writ. We consider the present case as presenting a proper occasion for the interposition of the court below; and the direction of that court, in referring the question of what, if anything was due, to the decision of a jury, as entirely unexceptionable. This offer of the defendant's was admissible for the purposes stated. However conclusive the sheriff's return may be in an action against him, or in an action between third persons, where the return is regular, (and we are far from thinking, that the authority of this official act should in those instances be diminished,) it would be attached with great oppression, to give the same weight to the loose and irregular returns which are often made by that officer. The intention of the law is, that the writ of execution should be returned to the next term—such is the exigence of the writ itself, and the sheriff ought not to neglect it. But the practice is, in most counties, exceedingly lax in this respect. In many cases, the writ is not returned at all; in others, not until the lapse of years after its exit, when the sheriff, considering the matter as settled, or for-
[*423] getting the real transaction, *indorses a return *pro forma*. In the case before us, the *alias fieri facias*, No. 14, to February Term, 1800, was retained in the sheriff's hands for six years, and then returned *nulla bona*. Upon the strength of such a return, the court were asked to exclude the evidence offered by the defendants, going to show, that whilst that writ remained in the sheriff's hands, he sold their property and applied the proceeds towards the payment of the plaintiff's judgment. In *Weidman v. Weitzel*, 13 Serg. & Rawle, 96, this

[Williams, Executor of Pennock, v. Carr and another.]

court determined, that a sheriff's return to a *feri facias*, made two years after the proper time, and one year after a suit brought, in which its effect was material, was unworthy the name of a regular legal return, by which the party should be concluded.

We think the decision of the Court of Common Pleas upon this offer was correct, and, therefore, the first assignment of error is not sustained.

2. Among the points presented to the court, to which their answers were requested, was the following:—

“4th point.—Whether the indirect evidence given by the defendants, of proceedings in other judgments, afforded any legal presumption, that any of the debt or damages had been paid to the plaintiff, in opposition to the direct and positive evidence of the judgment and proceedings in this case?”

To which, the court gave in charge to the jury the following answer:—

“4th answer.—It is evidence of the property of Carr's being sold, which might be appropriated towards Pennock's execution; it being prior to the execution of the Johnsons, does form a strong presumption of payment, and sheriff Cummings, who held these executions, states in his evidence, that it is his impression that he paid money to the attorney of Pennock on account of that judgment, but that he is not certain.”

This answer constitutes the other error on which the plaintiff insists that the judgment should be reversed.

The court having properly admitted the evidence, had passed it to the jury, that they might ascertain its force; it was peculiarly the province of the latter, to determine the question submitted in this fourth point; provided, the words “any legal presumption” be taken in that sense, in which alone it was proper to use them, after the admission of the evidence referred to, (that is to say, in the sense of “any presumption, or proof;” and in which the court appear to have understood them. The court may, with propriety, give their opinion to the jury upon a question of fact; nor will this court reverse for error in such opinion, unless it clearly appear that the jury were thereby precluded from deciding for themselves. *Riddle v. Murphy*, 7 Serg. & Rawle, 230. The same remark is applicable to the opinion of the court on the weight of testimony. But the plaintiff having requested their opinion, *cannot complain that the court [*424] proceeded to give it; and, from an examination of the evidence, as it appears in this record, we can discern nothing wrong or erroneous in their estimate of its value in their answer, which they submitted to the jury in reply to his proposition. We are, therefore, of opinion, that the plaintiff has also failed

[Williams, Executor of Pennock, v. Carr and another.]

to sustain this assignment of error, and that the judgment should be affirmed.

Judgment affirmed.

Cited by Counsel, 2 M. 391; 9 N. 92; s. c. 7 W. N. C. 277.

Cited by the Court, 5 W. 65; 2 J. 301; 8 S. 208.

[SUNBURY, JUNE 15, 1829.]

M'Clay *against* Benedict.

APPEAL.

The admission of a party claiming right to defend in ejectment as landlord, under the ninth section of the act of the 21st of March, 1772, is an act of the court, whose duty it is to inquire before making the order, whether the applicant really stands in the relation of landlord, or whether his claim of title is consistent with the possession of the occupier.

ON an appeal from the Circuit Court of *Mifflin* county, it appeared that this was an amicable ejectment for a lot of ground in Lewistown, (entered originally in the Court of Common Pleas of *Mifflin* county, and on the same day certified into the Circuit Court,) by Samuel M'Clay against E. L. Benedict.

The following is an extract from the record of the Circuit Court:—"And now, 31st December, 1828, Hale appears for D. H. Hulings, the landlord, and pleads not guilty, and enters a rule of arbitration. Due notice to the plaintiff. D. H. Hulings, landlord and party in interest, appears according to law, on the 16th of January, 1829. Plaintiff not appearing, and clerk of the Circuit Court acts in place of absent party, when D. Stuart, Henry Kulp, and Samuel Smith, are chosen arbitrators; and clerk fixes the 10th of February, 1829, to meet at Mrs. Elliott's. 11th of February, 1829, the plaintiff, Samuel M'Clay, comes and discontinues this suit. Witness his hand and seal.

"SAMUEL M'CLAY."

"And now, to wit: 13th of February, 1829, report of arbitrators is filed awarding in favour of the defendant, and that the plaintiff has no cause of action. And now, at a Circuit Court, the 18th of April, 1829, on motion of Hall, for the plaintiff, to set aside the report of the arbitrators; after argument, award of arbitrators and proceedings set aside. Whereupon D. H. Hulings, the landlord of E. L. Benedict, the

[M'Clay v. Benedict.]

defendant in this case, appeals from the judgment of the Circuit Court in setting aside the award of arbitrators, and setting aside the proceedings."

Hale, for the appellant.

Hall, *contra*.

*The opinion of the court was delivered by

ROGERS, J.—The ninth section of the act of the 21st [*425] of March, 1772, prescribes, that it shall, and may be lawful for the court, where an ejectment may be brought, to suffer the landlord to make himself a defendant, by joining with the tenant, to whom a declaration in ejectment has been delivered. The admission of a party claiming right to defend, is clearly an act of the court, whose duty it is to inquire, before making the order, whether the applicant stands in relation of landlord, or whether his claim of title is consistent with the possession of the occupier. It is not every person who claims to be landlord that is really such, nor is it every claim of title which gives right to defend the suit. In England, under the statute 11 Geo. 2, ch. 19, s. 13, it was at first holden, that it was not every person claiming title, who could be admitted to defend as landlord, but only he who had been in some degree in possession, as receiving rent, &c. But this doctrine was afterwards reprobated by Lord Mansfield, Burr. Rep. 1290, and the word landlord, in the act, was considered to extend to every person whose title was connected to, and consistent with the possession of the occupier, and divested or disturbed by any claim adverse to such possession, as in the case of remainders, or reversions, expectant upon particular estates. So careful have the courts been to preserve the rights of the original parties, that if a person should be admitted to defend as landlord, where title is inconsistent with the possession of the tenant, the lessor of the plaintiff may apply to the court, or to a judge at his chambers, and have the rule discharged with costs. If, however, he neglect to do so, and the party continue on the record as defendant, such party will not be allowed to set up such inconsistent title as a defence at the trial. Adams on Eject. 232. Under the construction of the statute 11 Geo. 2, which is similar to our act, it is not a matter of course, that a person should be made co-defendant. In practice, on application to the court, it is frequently refused. For where a person claims in opposition to the title to the defendant, he can in no light be considered as landlord, and it would be unjust to the tenant, that he should be made co-defendant, as their defences might interfere with each other. So also, the very question in dispute, between the parties may be, whether

[*M'Clay v. Benedict.*]

the person claiming to be made a co-defendant is entitled to be landlord or not. Adams on Eject. 230, in note. Hence it is, that the act has very wisely given the court a control over this matter; as otherwise, a stranger to the record might obtain an advantage over the parties to the suit. There is a great difference between being plaintiff and defendant in ejectment; and if a person could, without leave of the court, make himself a co-defendant, it would enable him at his own will, to place himself in the situation of the defendant in the ejectment, and by this means, make good a title, which he would be unable to support [*426] as plaintiff. It might prove equally vexatious to the *defendant, who would sometimes be surprised with a landlord, whose title he disclaimed, placed on the record by collusion with the plaintiff, or whose claim being inconsistent with his own, might embarrass his defence. It has been argued, that inconvenience may be experienced from the fact, that the Circuit Court does not sit in the respective counties but once a year, and that this may create delay, or give an opportunity for collusion between the plaintiff and tenant. This is an inconvenience inseparable from the organization of the court; but in all cases of fraud, the court would relieve on motion, by reinstating the parties in their original rights. And in a special case, application might be made to the Supreme Court, in bank, or to one of the justices in vacation, who upon reasonable notice to the adverse party, would take such order as to prevent delay or any undue advantage. The only evidence we have that Mr. Huling is the landlord, is the entry on the record. "Hale appears for D. H. Huling, the landlord, and pleads not guilty, and enters a rule of arbitration." There is no adjudication of the court, by which he is made a co-defendant, and we are to consider him in no other light than as a stranger to the record. His entering a rule of reference was an unwarrantable interference with a suit to which he was no party. It is the opinion of the court, that the judgment of the Circuit Court be affirmed.

Judgment affirmed.

Cited by Court, 2 N. 181; 12 N. 467; s. c. 8 W. N. C. 494.

[SUNBURY, JUNE 25, 1829.]

Gonsalus *against* Liggitt.

IN ERROR.

Where the plaintiff, suing before a magistrate, has a judgment given against him, from which he appeals, and the cause being then arbitrated, an award is given in favour of the plaintiff, from which the defendant appeals, and on the trial in court, a verdict is given in favour of the defendant: the defendant is entitled to the costs of the arbitration, and also, to the subsequent costs in court.

ERROR to the Court of Common Pleas of *Centre* county.

Richard Gonsalus, the plaintiff in error, sued Abraham Liggitt before a justice of the peace, who gave judgment in favour of the defendant for seventeen cents, whereupon the plaintiff appealed. In the Court of Common Pleas the plaintiff entered a rule of reference, and the arbitrators awarded ninety-two cents in favour of the plaintiff; the defendant then appealed, and on a trial there was a verdict in favour of the defendant.

The court decided, that the defendant was entitled to recover from the plaintiff the costs of the arbitration, and also the costs *which subsequently accrued in court, and that the [*427] plaintiff was entitled to the costs before the justice, and if he had paid them, the amount must be deducted from the defendant's bill.

The only question raised in the Supreme Court, was that of the costs, which was argued by *Potter*, for the plaintiff in error, and *Blanchard*, *contra*.

PER CURIAM.—This case is not distinguishable from *Flick v. Boucher*, 16 Serg. & Rawle, 373, where the defendant having been the appellant at every stage, succeeded finally in abating the judgment of the justice by obtaining a nonsuit. Here he did so by a verdict and judgment on the merits; and that is the only difference. The judgment, so far as it allows the plaintiff the costs before the justice, is erroneous; but as this writ of error is brought by the plaintiff, the defendant can have no advantage from it.

Judgment affirmed.

Cited by Counsel, 1 Penn. R. 488; 1 W. 53; 2 R. 441; 6 Barr, 464.

[SUNBURY, JUNE 25, 1829.]

Crawford *against* Jackson.

APPEAL.

Where there is a demurrer to parol evidence, of a fact, which is not evidence of any other fact, but itself a substantive ingredient of the case, a party may be required to join in demurrer.

On a demurrer to parol evidence, if the plaintiff refuses to join in demurrer, except on terms which the court disapproves, the plaintiff's evidence must be considered as withdrawn, and the jury must find a verdict for the defendant.

APPEAL from the Circuit Court, sitting in *Huntingdon* county.

John Crawford, brought an action of *indebitatus assumpsit* in the Common Pleas of Huntingdon county, against William Jackson, which was removed into the Circuit Court, and tried before His Honour Judge Smith, on the 22d of August, 1828.

The following evidence was given by the plaintiff.

John M'Cahan, sworn.—On the 13th of April, 1819, John Crawford called at my house; told me he was likely to get into a dispute with Mr. Beatty about whiskey he had sold to Beatty; said he was afraid he would have to sue him; said he was an old acquaintance; did not like to sue him. I told him I would try and get the matter accommodated; I directed him to come back the next day; I would send for Beatty, who lived four miles out of town; I sent for Beatty, they both met the next day at my house; I took up their accounts, heard each of their stories, and struck a balance which they both appeared to be [*428] satisfied with; there was something said *about the payment. I took Crawford to the end of the house; I advised him, if he did not stand in need of the money, as I knew the money was to come from Jackson to Beatty, to take an assignment of a judgment, that Jackson held against Gersham Lambert. I had been an arbitrator and knew the circumstances of the judgment; Crawford replied, he did not stand in need of the money, and we returned into the house. I mentioned the arrangement to Mr. Beatty, that I had proposed to Crawford; he was satisfied with it, and we all went to Jackson's house together; before I left the house, I put two bonds in my pocket, (Beatty's papers were all in my possession,) due by Jackson to Beatty; the arrangement was mentioned to Jackson; we all went together to the prothonotary's office; Jackson, when there, asked for his bonds; I took one out, on

[Crawford v. Jackson.]

which he had made a partial payment, and made a calculation of the balance due; gave that one up to him, and indorsed a credit on the other, for the balance of Crawford's account; then this indorsement was put on the record, and signed by Mr. Jackson :

William Jackson,)	No. 22, April, 1818.
v.	Summons debt by bond—
Gersham Lambert. }	Rule of reference.

Report filed the 15th of August, 1818; find for the plaintiff, four hundred and sixty-four dollars and seventy-six cents, interest from the 5th of August, 1818; plaintiff agrees to a stay of execution until the 1st of April, 1819; judgment, plaintiff to pay all costs.

Assignment.

This judgment for the use of John Crawford, 14th of April, 1819.

Test, WILLIAM STEEL.

Signed WILLIAM JACKSON.

The assignment is in Steel's handwriting. We then dispersed, and I heard no more of the matter for several months. Mr. Crawford came into my office, and said that he had just heard that Lambert had assigned all his property to his children before this judgment, and was not worth anything. I told him I was a good deal surprised at it. In the evening I went down to Mr. Jackson's, took him into a front room, and told him what Crawford had mentioned to me; he appeared to be surprised at the information too. I stated my opinion, that he was liable for the money to Crawford, and that he ought to adopt immediate measures to secure himself. Lambert lived about five miles below this place, and I advised him to go to him, and try to get possession of some bonds he had on people in Jersey. Jackson said he would have to pay that money, it would be an injury to him, as he had intended to pay Beatty in the spring, and he would not be able to do so. I advised him to take legal advice on the subject; and told him if he *would come [*429] up on Monday morning, we would examine the deeds. I saw him on Monday; he had seen Mr. Smith in the meantime. and he then thought differently on the subject; my application to Crawford, was on Jackson's account; it was a voluntary act of my own, and not of Mr. Crawford's seeking; I do not recollect what conversation took place at the time of the assignment; they were all my friends, and I wanted to have the matter settled all round without a law suit; Jackson

[Crawford v. Jackson.]

demanded his bonds before he signed the assignment; Mr. Beatty, Mr. Crawford, Jackson, and myself, were all there at the time of the assignment; I was under the impression that he was liable, and he appeared to be so too; but, whether from my conversation or not, I do not know.

William R. Smith, Esq., sworn.—I issued this *præcipe*, (*præcipe*, for *fiere facias*, No. 83, January 7th, 1820, William Jackson v. Gersham Lambert, shown witness.) I was the attorney in the original suit; I never was the attorney of Mr. Crawford, and received no directions from Mr. Crawford; I have no distinct recollection of the directions given by Mr. Jackson to me; the *scire facias* was not issued by me.

Patrick Guin, sworn.—Gersham Lambert owed me a pretty large sum of money, and if I had not had his son bound for it, I would have got nothing. I did not know at the time I lent him the money, that he had conveyed away his property. At the time of my judgment, he was not worth anything. In 1819, he had conveyed away his property; I issued a small execution against his personal property, but the bank had issued on the same day; I having the son, got a part of my money.

Gersham and David Lambert are both dead; I believe both were insolvent.

The plaintiff also gave in evidence several deeds and records, which are not now material, and rested. Whereupon the defendant, by his counsel, demurred to the evidence. The plaintiff's counsel then asked the court to require the defendant's counsel to admit upon record, the inference, stated in the paper filed, marked A, previous to their joining in demurrer, which paper is in the following words:

John Crawford	}	In the Circuit Court of Huntingdon county.
v.		
William Jackson.		

In this case the defendant's counsel, having demurred to the evidence of the plaintiff, the plaintiff's counsel ask the court to require the defendant's counsel to admit upon record, previous to their joining in the demurrer, the inference which may be drawn by the jury, from the circumstance of Beatty, Jackson, and Crawford being all present when the assignment given in evidence was made; from the nature of the transaction itself; from William Jackson's (the defendant's) conduct, (as proved by [*430] John McCahan) at the *time he called upon him, to request him to take some steps to secure himself against Lambert's insolvency; and from the circumstance of Mr. Jack-

[Crawford v. Jackson.]

son's attorney, William R. Smith, issuing the execution on the assigned judgment, and having no direction or authority from Mr. Crawford to do so; that it was the understanding, and agreement of Crawford and Jackson, at the time of the assignment of the judgment against Lambert, that Jackson was to be liable to Crawford, if the judgment proved ineffectual, to collect the money from; and if the defendant's counsel refuse to admit this inference, and if the court refuse to compel them to admit it, the plaintiff's counsel refuse to join in demurrer.

J. GEO. MILES, and JOHN BLANCHARD,
Attorneys for the plaintiff.

23d of August, 1828.

After this paper had been filed by the plaintiff's counsel, the court refused to require the defendant to admit on record the inference therein stated; and the plaintiff's counsel refused to join in demurrer; whereupon the court instructed the jury, that the plaintiff, by refusing to join in demurrer, had withdrawn the evidence, and, that there was therefore no evidence before the court and jury.

After the jury had given a verdict for the defendant, the plaintiff's counsel moved the court for a new trial, for the following reasons:

1. Because the court erroneously withdrew the evidence, which was given in the cause, from the jury, and instructed them that there was no evidence before them on which they could decide.

2. Because the court erroneously compelled the plaintiff to submit to having the evidence withdrawn from the jury, or to join in the demurrer of the defendant, notwithstanding the plaintiff's counsel asked the court to require the defendant's counsel to admit the inference drawn, from the circumstances stated in the paper filed, marked A, (as per paper filed,) previous to their joining in the said demurrer.

3. Because the court refused to require the defendant's counsel to admit the inference, which the plaintiff's counsel asked the court, (as per paper filed, marked A,) to require them to admit from the circumstantial evidence stated in that paper, previous to the plaintiff's joining in the demurrer of the defendant to the evidence, and because the court withdrew the cause from the jury, on the plaintiff's counsel refusing to join in the said demurrer, for the reasons stated in the said paper filed, marked A.

4. Because the verdict is against law, and the justice of the cause.

[*Crawford v. Jackson.*]

The motion for a new trial was overruled, from which decision the plaintiff appealed.

The argument was conducted by *Miles* and *Blanchard*, for the appellant, who contended, that the court ought to have discharged the jury, and compelled the plaintiff to join in demurrer, and cited, 1 Tid. Pr. 315; *Duerhagen v. The United States Insurance Company*, 2 Serg. & Rawle, 185; [*431] *Dickey v. Schreider*, 3 Serg. & Rawle, 413; *Lessee of Maus v. Montgomery*, 11 Serg. & Rawle, 329; 7 Cranch, 565; Bull. N. P. 313; 2 Roll's. Rep. 117; *Alleyn*, 18; *Cro. Eliz.* 682; *Patrick v. Hallett*, 1 Johns. Rep. 245; *Lessee of Ross v. Eason*, 4 Yeates, 54; *Snowden v. The Phoenix Insurance Company*, 3 Binn. 457; *Peake's Ev.* 4, (second edit.)

Potter, contra, answered, that the court possessed no power to compel a joinder in demurrer; and, could have adopted no other course than that taken. He cited *Jackson v. Crawford*, 12 Serg. & Rawle, 165; s. c. 14 Serg. & Rawle, 290; 4 Cranch, 221; 1 Wash. 151, 220; 2 Wash. 211; 1 Bibb. 612.

The opinion of the court was delivered by

GIBSON, C. J.—*Baker's Case*, 5 Co. 104, is an explicit authority, that a refusal to join in a demurrer properly tendered, is a waiver of the evidence; to give effect to which, it is the business of the court to direct the jury to disregard it. But, whether a party can properly tender a demurrer to parol evidence, seems not so clear. The weight of the authorities seems to be, that where such evidence is certain, and as little susceptible of variance as written evidence, it stands on the same footing. Where it is loose, and made up of circumstances, which may be urged to a jury with more or less success as evidence of other circumstances, it certainly is not settled, that it may be made the subject of a demurrer, without the assent of both parties. Yet, occasional expressions are not wanting to favour an opinion entertained by some, that the party producing such evidence, may be required to join, on having secured to him the benefit of every circumstance which the evidence might legitimately conduce to prove. The demurrer to evidence originally grew out of necessity; there having been no other means of securing to a party, the right of having the law of his case decided by the constitutional tribunal, when there was in reality no fact in dispute; and it fell into disuse only when the increasing liberality of the English judges in granting new trials, afforded a more convenient method of obtaining the judgment of the superior courts at Westminster. With us, there is perhaps, some reason

[Crawford v. Jackson.]

why the use of it should be retained, and even encouraged, inasmuch as the opinion of the court in the last resort, cannot be had on a motion for a new trial in the Common Pleas. No one can be prejudiced by it, as it is, at best, a desperate remedy for him who has recourse to it; and it would be hard to deprive him of the miserable advantage it affords in comparison with a trial before a prejudiced or pre-determined jury. Be that as it may, our province is not to legislate, but to pronounce the law as we find it, the legislature being alone competent to alter it where there is room to dissent from the reason or policy of its provisions. Without intimating an opinion as to any other case, then, it may be affirmed, that where there is a demurrer to evidence of a fact, which is not evidence of any *other [*432] fact, but itself a substantive ingredient of the case, a party may be required to join.

What then, was the evidence here? At no time previous to the assignment, had Jackson a transaction with Crawford. Beatty, to whom Jackson is indebted, comes to him along with Crawford, and desires him to assign his judgment against Lambert, in payment of his debt to Beatty. Jackson does not open his lips to any one, except to require his bonds of Beatty; one of which being delivered up, and a receipt for the residue indorsed on another, he marks, by direction of Beatty, the judgment to Crawford's use. This comprises every title of the transaction in the presence of the parties. The judgment having afterwards been found worthless, a common friend calls on Jackson, who appears to think himself liable (the witness does not say to whom) for the amount of the judgment; and he afterwards attempts to collect the money from Lambert. Now it is not pretended, that there was any implied contract of warranty, on which Crawford could have recourse to Jackson; and it has already been twice decided, that the facts which happened at the time of the transfer, give no colour to the pretext of a special agreement. Indeed, those facts are not relied on by Crawford himself, who claims the inference of such an agreement, from Jackson's subsequent admission of liability to some one. But this admission is attributable to a belief, that he remained liable to Beatty; who, had he not agreed to accept of the assignment to Crawford as satisfaction, might still have recovered his debt, on the ground, that the means of payment which were put into his hands, or (what is the same) into the hands of a person designated by him, had proved unavailing. But, the delivery of the bond would be decisive proof, that he had consented to consider the assignment as satisfaction; and, if Crawford, also has barred himself from proceeding against Beatty, he cannot get round the impediment, by going against

[*Crawford v. Jackson.*]

Jackson, who did not consent to become liable to him. Jackson, therefore, was mistaken in supposing himself liable to any one; and to infer the existence of a secret agreement of warranty, from acts done under a mistaken belief of liability, and that, too, in the teeth of a witness who testifies to the contrary, would be forced and unnatural. A jury may make all natural and reasonable deductions; but, they cannot madly assume facts at pleasure, and without the colour of evidence. The subsequent conduct of Jackson is attributable to an imaginary liability to Beatty, not to the consciousness of a secret agreement with Crawford, for which there is not the least ground of suspicion. It seems, therefore, that the judge who tried the cause did right in directing the jury, that the refusal to join in the demurrer, was a waiver of the evidence.

HUSTON, J., dissented. TOD, J., having been of counsel in the cause, took no part in the decision.

Judgment affirmed.

Cited by Counsel, 3 Wh. 383; 2 Barr, 199; 1 H. 274.

Cited by the Court, 2 H. 277.

[*433]

*[SUNBURY, JUNE 25, 1829.]

M'Iloy and Another *against* M'Iloy and Another.

IN ERROR.

A legatee who has assigned his interest under the will to another person is a competent witness to prove the will, although the consideration of the assignment is a bond for a given sum, payable to him at a future day.

ERROR to the Court of Common Pleas of *Huntingdon* county.

On the trial of an issue directed by the Register's Court of *Huntingdon* county, to determine the validity of a paper, purporting to be the last will of Thomas M'Iloy, William, his son, who was named in it as one of the executors, and also had a legacy bequeathed to him, was offered as a witness in support of the will. He had formerly renounced the executorship, and had, by an instrument, reciting a consideration of one hundred and fifty dollars, released his interest as a legatee to William M'Williams, and Ann, his wife, which Ann was one of the children of Thomas M'Iloy. The asserted consideration had not, however, been paid to William M'Iloy, but rested on a single bill given by William M'Williams for that amount, and

[M'Iroy and another v. M'Iroy and another.]

was expressed "to be paid absolutely." The court admitted the witness, and a bill of exceptions was taken.

The writ of error was argued by *Bell* and *Hale*, for the plaintiffs in error, who contended, that the bond could not be enforced by William M'Iroy against the obligor; and, therefore, the release was without consideration. But a release will not render the witness competent, who was otherwise at the execution of the will. 1 Phil. Ev. 173, 174; Peake's Ev. 428; *Jackson v. Woods*, 1 Johns. Ca. 163; *Newlin v. Newlin*, 1 Serg. & Rawle, 275; 12 Mass. 361; 4 Dess. 274.

Miles, contra, contended, that the witness was admissible; observed upon the difference between our act of assembly and the English statute, and quoted, *Hight v. Wilson*, 1 Dall. 94; *Rossetter v. Simmons*, 6 Serg. & Rawle, 452; *Wyndham v. Chetwynd*, 1 Burr, 417; 3 Harr. & M'Hen. 513; *Dornick v. Reichenbach*, 10 Serg. & Rawle, 84; *Lessee of Cain v. Henderson*, 2 Binn. 108; *Lessee of Johnson v. Eckart*, 3 Yeates, 427; *Lessee of Sweitzer v. Meese*, 6 Binn. 500.

The opinion of the court was delivered by

GIBSON, C. J.—The witness is the son of the testator, and was named an executor and a legatee; but, having renounced the executorship, and parted with his legacy to his sister and her husband, the court admitted him as competent to prove the execution of the will. One ground of objection, that he is incompetent from interest *which existed when the will [*434] is supposed to have been made, was overruled in *Kerns v. Soxman*, 16 Serg. & Rawle, 315; and the question, therefore, is, whether he now stands clear of interest as a legatee. The release, as it is called, to his sister and her husband, was an equitable assignment; and, the witness could not be affected by the verdict, whether the will were established or not, as the note given for the consideration, contained a stipulation that it should be paid in any event. He stood, therefore, precisely as any other disinterested assignor, who is a competent witness, whether he has parted with his property in the thing, before suit has been brought to recover it, or afterwards. *Steele v. The Phoenix*, 3 Binn. 306, in which this was directly decided, perhaps, for the first time, is not only consistent with the principles of all the English and American modern authorities, but particularly fortified by *Browne v. Weir*, 5 Serg. & Rawle, 401; *Jacoby v. Laussatt*, 6 Serg. & Rawle, 300; *Patton's Administrators v. Ash*, 7 Serg. & Rawle, 116; *Richter v. Selin*, 8 Serg. & Rawle, 425; *Fetterman v. Plummer's Administrator*, 9 Serg.

[*M'Iroy and another v. M'Iroy and another.*]

& Rawle, 20; *North v. Turner*, 9 Serg. & Rawle, 244; *Stoever v. Stoever*, 9 Serg. & Rawle, 434; *Dornick v. Reichenbach*, 10 Serg. & Rawle, 84; *Porter's Executors v. Neff*, 11 Serg. & Rawle, 208; *Willing v. Peters*, 12 Serg. & Rawle, 177, and *Willing v. Consequa*, 1 Peters, 307; a phalanx of authorities, which, were I even so inclined, I should deem myself incompetent to overthrow. But they are in accordance with the spirit of the age which has brought order out of confusion, and of the rude anomalies of early times, when the jury was frequently plunged into darkness by a suspicion, that any light which was not of the very purest kind, might lead them astray, constructed a system of principles, founded in technical reason, no doubt, but consistent at least with each other. Not the least valuable among these, is that principle which prevents a witness from being excluded on the ground of interest, where the legal consequence of the verdict will not be the gain or loss by him, of a right which may be made a subject of contest in a court of justice. What is the objection here? Not that the right of the witness to recover the consideration of the assignment, will be made better or worse by the verdict; but, that there may possibly be a secret agreement, that the legacy shall be re-assigned as soon as the will shall have been established; and, that thus, a party may in reality be a witness in his own cause, without affording his antagonist the same advantage. But such an agreement could not be enforced, and, like every other which rests on the honour of the parties, it would furnish an objection only to the witness's credibility. We must, at least, suppose that jurors are capable of weighing and making proper allowance for motives that may create a bias, for if they are not so in fact, the boasted excellence of the trial by jury, is a miserable delusion. As to the inequality of advantage between the parties, it is one of those inconveniences which necessarily spring [435] from the imperfection of human *institutions; and which cannot be remedied without perhaps producing something worse. On principle and authority, therefore, it seems to me the witness was properly admitted.

HUSTON, J., and TOD, J., dissented.

Judgment affirmed.

Cited by Counsel, 5 W. & S. 435; 5 H. 63; 7 H. 489; 9 H. 298; 7 S. 246.

Cited by the Court, 3 R. 409; apparently approved in *Search's Appeal*, 1 H. 111, though previously qualified to such an extent as to be virtually overruled in, 5 W. & S. 510; which was followed in 9 H. 298.

[SUNBURY, JUNE 25, 1829.]

Kessler *against* M'Conachy.

IN ERROR.

The property of a stranger found upon the demised premises, is liable to distress by the landlord.

In a replevin by the stranger, he cannot call the tenant as a witness to prove no rent was due.

The exemption of a stove, belonging to the tenant, from distress, under the act of the 29th of March, 1821, is confined to that which is used in his family, and does not extend to one in his shop, apart from his dwelling-house.

Informalities in an avowry for rent in arrear, are cured by going on to trial.

If, on the issue of no rent in arrear, the jury find for the defendant, but omit to find the value of the goods, judgment of *retorno habendo* may be entered.

A book, made up by transcribing entries, made by a journeyman on a slate, some of them being transcribed by the journeyman, and some by the party, some on the same evening, and others several days afterwards, but all within two weeks, is not admissible in evidence as a book of original entries, supported by the oath of the party.

Eviction of the tenant by the landlord, has no operation on rent already due: it suspends the rent of the month, quarter, or other portion of time running on at the time of eviction.

If, after a distress, made on the goods of a stranger, the tenant obtains a judgment of a justice of the peace in his favour in a proceeding under the act of the 20th of March, 1810, to compel the landlord to defalcate the tenant's just account, the stranger, having taken out a writ of replevin, may use this judgment as *prima facie* evidence on the issue of no rent in arrear.

ERROR to the Court of Common Pleas of *Mifflin* county.

Frederick Kessler brought an action of replevin against James M'Conachy for one stove of the value of twenty-five dollars. The defendant avowed for rent in arrear. The plaintiff replied, 1. No rent in arrear. 2. *Non demisit*. 3. If a lease, the tenant was evicted by the landlord before the expiration of the lease. 4. That the article replevied is the property of the plaintiff, and not of John Bombaugh, the tenant.

Several bills of exceptions were taken on the trial. The first was to the admission of the record of David Milliken, Esq., a justice of the peace, of a proceeding commenced before him the 1st of April, 1824, in which John Bombaugh, tenant, was complainant, and James M'Conachy, landlord, defendant, to set off the tenant's just account against the landlord, who had distrained his goods for rent; the justice having decided, on hearing the parties, that no rent was *due from Bombaugh [*436] to M'Conachy, and that he was justly indebted to M'Conachy in the sum of four dollars forty-eight and three-

[*Kessler v. M'Conachy.*]

quarter cents. To the admission of this evidence the defendant objected. The court rejected the evidence, and sealed a bill of exceptions.

The plaintiff next offered Bombaugh, himself as a witness, to testify in respect to the lease, and the ownership of the stove. The court rejected his evidence, and sealed a second bill of exceptions.

To support an account against the landlord, a book, sworn by Bombaugh, to be his book of original entries, was next given in evidence by the plaintiff, as a set-off by the tenant against the rent; and, to meet this evidence, M'Conachy offered his book of original entries, supported by his oath and that of David Milliken, Esq.

M'Conachy swore as follows:—"This is my book of original entries; my journeyman made the entries, some of them on a slate. He gave it in, may be, made, the same evening; don't think any as long as two weeks; I suppose less than two weeks; some of them made the same evening, or next day; some of them in the week; some done by myself."

The evidence of David Milliken, was to this effect:—"I don't recollect the book. This account was before me on the question about the rent. I think he then said, that some he entered off the slate soon, and some might have stood near a couple of weeks."

Some alterations and erasures were apparent in the book, but it was admitted, and the court sealed a third bill of exceptions.

Evidence was given by the plaintiff to prove his ownership of the stove, which it appeared he had purchased of Bombaugh for the wood-work of a wagon, and left it in his shop till he should send for it. The plaintiff also proved an eviction of Bombaugh, the tenant, by the landlord, on the day before the expiration of the lease, which appeared to be for a year, the rent payable monthly. The distress was for eleven months rent in arrear.

The following charge was delivered to the jury by Burnside, President:

"The Supreme Court have decided, (*O'Donnel v. Seybert*, 13 Serg. & Rawle, 57,) that where property is found on the premises, although it does not belong to the tenant, it is liable to the landlord's distress; and in the same book, pages 180, 181, that the goods of a stranger found on the premises, are liable to distress for rent, is one of the early doctrines of the common law; the reason of which has long since ceased. Courts of justice have, in many instances, leaned against it, but, it transcends judicial power to abrogate it. However, if rent was due, and unpaid, and no eviction, the stove in question was liable to dis-

[Kessler v. M'Conachy.]

tress, unless it was exempted by the poor laws. The premises rented were a shop. The family of Bombaugh lived at a distance, in a separate house. The stove distrained was in the shop. Bombaugh had a stove rented in the house in which his family resided. By the act of the 29th of March, *1821, [*437] one stove in the possession of any debtor, shall, and is hereby exempted from levy, &c. (His Honour here read the act.) I think it is the family stove that is exempted; the stove that warms his wife and children, and that this is the sound and true construction of the act. Whether then, the stove was transferred to Kessler or not, I hold, that if there was rent fairly due, and unpaid when the distress was made, the landlord might legally distrain it. What was the extent of the lease? How was the rent payable? You have evidence that it was leased for a year, payable monthly. Where the rent is payable monthly, the landlord may distrain after the end of any one month, for the rent due and unpaid. It is said, M'Conachy evicted Bombaugh before the end of the lease. Did he do so? You have heard the evidence on this point, and you will judge of it. If you are satisfied that the landlord entered on the tenant before the end of the lease, the rent would be suspended. I agree to the position, that if the lessor enters into a part, the whole rent is suspended. Here the rent was payable monthly. He entered on the last day, that is, if there was an eviction, it was on the day before the tenant should have removed; I think it suspended the last month's rent, and no more; for that month there is no distress. This opinion is given under the particular circumstances of the case. The distress was for eleven months' rent; it could be for no more, for the last month could not be distrained for, until the rent was due. The amount was eleven dollars. The defendant's book account, if you believe it just, amounts to nine dollars and eighty cents, making twenty dollars and eighty cents. Bombaugh's book account amounts to twelve dollars and one-fourth of a cent, leaving eight dollars and seventy-nine and three-fourth cents of rent due and unpaid.

"You are the judges of these books. If you think the books are not books of original entry, you ought to reject them. If you think any of the items have been altered to meet this case, it will destroy such entry, and such a book ought to be rejected by the jury. Here there was no appraisement; so far the landlord proceeded irregularly, and he ought to be charged with all the items distrained, and the full value of them before the stove is taken into consideration. If those goods are worth eight dollars and seventy-nine and three-fourth cents, then there should be a verdict for the plaintiff; and, as he has had the property

[*Kessler v. M'Conachy.*]

delivered to him, you will give him damages for the unreasonable distress. But after deducting the articles that were distrained from the amount of M'Conachy's demand, that is, the eight dollars and seventy-nine and three-fourth cents, or such other sum as you shall fix upon, you will find the balance of rent due M'Conachy, the avowant. There is a point made by the defendant's counsel, that Kessler never purchased this stove; if so, he cannot recover in this action."

The following errors were specially assigned:—

"1. The court erred in rejecting the evidence contained in the first bill of exceptions.

[*438] "2. The court erred in rejecting the evidence contained in the second bill of exceptions.

"3. The court erred in admitting the evidence contained in the third bill of exceptions.

"4. The court erred in charging the jury, that the goods of a stranger, found on the premises, were liable to be distrained for rent.

"5. The court erred in charging, that the stove in question was liable to the distress.

"6. The court erred in charging, that the eviction of the tenant by the landlord, suspended no more than the last month's rent.

"7. The defendant's avowry does not name for what lands the rent was due, how much was due, when, nor by whom due, and the jury have not found the value of the property distrained."

Benedict, for the plaintiff in error, argued, 1. That the decision of the justice, offered in evidence on the trial, was admissible and conclusive. The proceeding before him, was instituted in order to obtain a defalcation of the debt due from the landlord to the tenant, under the provisions of the twentieth section of the act of the 20th of March, 1810. *Purd. Dig.* 458. The landlord appeared, was fully heard, and did not appeal from the decision. He is now estopped from disputing the judgment, and it is very oppressive to put the tenant a second time to the trouble of proving the same facts, and still more so, to deprive the stranger, whose goods have been wrongfully seized, of the benefit of that estoppel. It may not always be in his power to prove the same facts which the tenant had proved, and thus the landlord, although precluded by the judgment from proceeding further against the tenant, is at liberty to avail himself, against an innocent stranger, of the summary and severe process of enforcing by distress the payment of rent, to which a competent tribunal has solemnly decided that he is not entitled.

[Kessler v. M'Conachy.]

2. It was error to reject the testimony of Bombaugh. As a witness, he was disinterested, for his interest was equally balanced. If the landlord recovered against Kessler, he would have been liable to Kessler for the same amount as the landlord.

3. On the third bill of exceptions he insisted, that M'Conachy's book was not evidence, and cited, *Smith v. Lane*, 12 Serg. & Rawle, 86, 87, 88; *Sterrett v. Bull*, 1 Binn. 237; *Curren v. Crawford*, 4 Serg. & Rawle, 5; *Crouse v. Miller*, 10 Serg. & Rawle, 155; 1 Bro. 147, 344; *Vance v. Fairis*, 2 Dall. 217; s. c. 1 Yeates, 321; *Patton's Administrators v. Ash*, 7 Serg. & Rawle, 126; *Cutbush v. Gilbert*, 4 Serg. & Rawle, 555; 1 Dall. 239; *Ingraham v. Boekius*, 9 Serg. & Rawle, 285; *Salk*. 285.

4. In respect to the charge of the court, he argued, that the goods of a stranger were not liable to distress. The right of distraining for rent is entirely founded on the relation between landlord and tenant. It has its origin in the feudal tenures of ancient times, when the subject demised was generally a farm, cultivated by an *inferior, whose humble furniture, [*439] stock, and implements of husbandry, constituted all the movable articles found upon the land; when the haughty barons, disdaining the slow progress of a law suit, and considering non-payment by their tenants as a breach of the fealty due from them, anticipated the effect of a judgment and execution, and rudely seized their tenants' goods. The great owners of lands thus possessed of an advantage, which no other creditor shared with them, had influence enough to carry the practice beyond its original limits; but, if it is reduced to its true principles, it cannot be extended to the adventitious and temporary occupancy of a mere stranger, one who knows not, at the time of leaving his goods upon the spot, that any rent is due, or perhaps, that any lease exists, and who suffers the same injustice in having his goods distrained for the rent of another, as he would in having them levied on by an execution for the debt of another. He cited, 4 Cranch, 299; *Com. Dig. Rent*, c. 4; *Co. Litt.* 148, b.

5. The court also erred in charging the jury, that eviction only suspended the rent prospectively. He contended, that it terminated the landlord's claim in regard to all antecedent rent, as well as to that which should come due afterwards, and quoted, *Com. Dig. Suspension*, *D. Vaughan v. Blanchard*, 1 Yeates, 176; *Gilb. on Rent*. 179; 4 Dall. 124; *Gilb. Ev.* 283, 279; 4 *Bac. Ab.* 369.

Hall, for the defendant in error, insisted that the certificate

[Kessler v. M'Conachy.]

of the justice was properly rejected. The proceeding before him was *res inter alios acta*. The judgment in a personal action cannot be given in evidence against one who is no party, although where the proceedings are *in rem*, the rule may be different. If the decision of the justice had been the other way, it would not have been binding on the plaintiff in replevin; and upon the issue of no rent in arrear, the defendant would have been obliged to make other proof of the rent due. The time when the proceeding was commenced before the justice, is an additional reason for rejecting the evidence. The distress had actually been made, and was proceeding in the manner prescribed by law, when the landlord received the summons to appear before the justice. If he had disregarded it, judgment would have been given against him by default, for any sum which the tenant, on an *ex parte* hearing, might plausibly have made out to be due.

2. The rejection of Bombaugh's testimony certainly was correct. It is impossible to show that his interest was equal either way. If he could establish that no rent was due, neither Kessler, the plaintiff, nor M'Conachy, the landlord, would have any demand against him; but if M'Conachy established the demand against Kessler, he would be entitled to sue Bombaugh, not only for the value of the stove, but for the costs and expenses of the replevin. *O'Donnel v. Seybert*, 13 Serg. & Rawle, 57.

3. It was proper to let M'Conachy's book go to the jury, who would determine according to the principles justly laid down by the *presiding judge. 4 Serg. & Rawle, 3; [*440] 9 Serg. & Rawle, 285; 16 Serg. & Rawle, 133; 2 Mass. Rep. 221.

4. It is now too late to assert, that the goods of a stranger, found on the premises demised, are not liable to distress. The peculiar remedy afforded to a landlord, has been too long incorporated into the very nature and essence of landed property, to admit of being separated from it unless by some act of positive legislation. Improved lands have been purchased, and vacant lands have been improved with the understanding, that the landlord's right to enter and distrain upon all chattels to whomsoever they might belong, which were found upon the premises after rent became due, was inviolable. The established form of setting forth the cause of taking goods, is an avowry, or acknowledgment, that they were taken by the landlord for rent due to him from the tenant of the *locus in quo*, and not from the plaintiff in the replevin as such; and the replication, that the goods in question belonged to the plaintiff, and not to the tenant, was a nullity.

[Kessler v. M'Conachy.]

5. In respect to the eviction, he contended, that it only suspended the rent to come due.

6. All objections to the form of the avowry, were waived by proceeding to trial; and it was unnecessary in this case, where the article was delivered to the plaintiff, to find its value. *Weidel v. Roseberry*, 13 Serg. & Rawle, 178.

The opinion of the court was delivered by

ROGERS, J.—We agree with the Court of Common Pleas, "That the property of a stranger, found on the premises, is liable to distress by the landlord." And this is on the authority of *O'Donnel v. Seybert*, 13 Serg. & Rawle, 57; *Weidel v. Roseberry*, 13 Serg. & Rawle, 180, grounded on the principles of the common law; and, as we think, the proper construction of the act of the 1st of March, 1772, entitled an act for the sale of goods distrained for rent, &c.

Where the goods of a stranger are taken for rent, the tenant will be liable over, and the measure of damages will be, the loss sustained by the sacrifice of property, and in this case, the costs of the replevin; and this is a sufficient answer to the second bill of exceptions, whether the tenant is a competent witness in the action brought by the stranger. He would not be equally interested, as argued at the bar, but his interest would be greater in favour of the plaintiff in replevin. 13 Serg. & Rawle, 57.

The plaintiff in error has taken seven exceptions, all of which, it will be unnecessary particularly to consider. We shall content ourselves with citing a single authority, and observing, that the fifth and seventh exceptions have not been sustained. *Weidel v. Roseberry*, 13 Serg. & Rawle, 178.

The points principally relied on, are those embraced in the third, fifth, and sixth exceptions.

*The defendant in replevin offered in evidence what he called his book of original entries, accompanied by [*441] his own oath, and the oath of David Milliken, Esq. The defendant, M'Conachy, being sworn, says, "This is my book of original entries. My journeyman made the entries, some of them on a slate. He gave it in, may be, made, the same evening. Don't think any as long as two weeks. I suppose less than two weeks. Some of them made the same evening, or next day. Some of them in the week; some done by myself."

David Milliken, Esq., says, "I don't recollect the book. This account was before me on the question of rent. I think he, (M'Conachy,) then said, that some he entered off the slate, and some might have stood near a couple of weeks."

Several objections occur to this evidence. The entries were

[Kessler v. M'Conachy.]

first made by the journeyman on a slate, and if they had been copied by him in a reasonable time, and proved by his oath, there would have been no objection to the testimony; or, if M'Conachy had made the entries, and had afterwards copied them in the book, it might have been deemed sufficient. And this would have been extending the principle as far as good policy requires. It was, however, copied by M'Conachy, not immediately, nor on the same evening, but some of the items may not have been entered for nearly two weeks after the work is alleged to have been done. *Vance v. Fairis*, 1 Yeates, 321. The defendant relies on his own oath, without producing the journeyman, or accounting for his absence, by which he deprives the plaintiff of the benefit of a cross-examination, and the possibility of showing from his testimony, that the work had not in fact been done. The defendant, as it would appear, derived his knowledge from the entries on the slate, from which he extracted the charges on the book. The admission of the oath of a party, to prove a book of original entries, is from necessity; and where the necessity does not exist, to avoid abuse, it should be received with caution. The entries should have been made, and transferred on or about the time the work was done; and it was incumbent upon the plaintiff to distinguish the items that were so made. To admit in evidence, entries after a week or more, would necessarily cause mistakes, and might be the means of great fraud. Books of original entries are, at best, but dangerous evidence, and we think, call for more clear proof than has here been given.

It is said, there was error in instructing the jury, that the eviction of the tenant by the landlord, suspended the last month's rent, and no more. In this we perceive no error. The property was leased for a year, the rent payable monthly, and the eviction took place the day before the lease expired. The general principle is, that if a lessor enter upon the lessee for life, or years, into part, and thereof disseise, or put out the lessee, the rent is suspended in the whole, and shall not be apportioned for any part. *Co. Litt.* 148, b. An interruption in [*442] the enjoyment of the premises demised, will *suspend the rent. 4 *Dall.* 125; 4 *Cranch*, 299; *Com. Dig.* title *Rent*, C. 4; *Com. Dig.* title *Suspension*, D.; 1 *Yeates*, 176; *Gilb. on Rent*, 179; *Gilb. L. E.* 270, 283; 4 *Binn.* 369.

Where the lessee takes a lease of part of the land, or enters wrongfully into part, there are a variety of opinions, whether the entire rent shall not be suspended during the continuance of such a lease, or tortious entry; and in the last case, it seems to be the better opinion, and the settled law at this day, that the tenant is discharged from the payment of the whole rent,

[Kessler v. M'Conachy.]

till he be restored to the whole possession, that no man might be encouraged to injure or disturb his tenant in possession, whom, by the feudal law, he ought to protect and defend. 4 Bac. 369, title Rent, letter M. Thus it will be perceived, that where the lessor enters on a part, the entire rent for the whole premises is suspended; and the reason given is, that the rent cannot be apportioned. In this case, the entry was on the whole, but the rent had been apportioned by the parties, so that the question remains, how far the doctrine of suspension extends; whether it embraces the rent for the year, or the last month, which was not then due. The suspension of the rent is intended as a punishment, and operates in the nature of a forfeiture, so that we do not feel inclined to extend it further than the adjudged cases. On a careful search, I do not find any case in which the precise point has occurred; we, therefore, feel ourselves at liberty to give the rule such a construction as may be most reasonable. We are of the opinion, that the court were right in confining the suspension of the rent to the month not due. As the rent was payable monthly, the landlord might distrain at the end of each month. To extend the principle further, might, in some cases, operate as a most grievous penalty; as where there was a lease for five years, the rent payable annually, but remaining unpaid, and an eviction, perhaps, through mistake, the last day on which the lease expired.

The landlord's warrant was dated the 30th of March, 1824, and the distress was made the 31st of March, on which the constable levied a stove and pipe, which is the plaintiff's cause of action. On the 1st of April, 1824, the tenant, in pursuance of the twentieth section of the act of the 20th of March, 1810, entered a proceeding to compel the landlord to defalcate, or set off an account, which he alleged he had against the landlord. On hearing, the justice decided, that there was no rent due to M'Conachy, and that he was indebted to Bombaugh, the tenant, four dollars and forty-eight cents. The plaintiff in replevin having replied to the avowry, no rent in arrear, offered the record in evidence.

In general, no one can be bound by a verdict or judgment, unless he be a party to the suit, or be in privity with the party, or possess the power of making himself a party. For it is said, and with the utmost justice, that he should not be bound by the result of an inquiry to which he was altogether a stranger. And this is said to be universally acknowledged, and is certainly supported by a host of *authorities, which I do not [*443] intend to controvert. I also concede, that it is a general, but by no means a universal rule, that a verdict shall

[Kessler v. M'Conachy.]

not be used as evidence against a man, where the opposite verdict would not have been evidence for him ; or, in other words, the benefit to be derived from the verdict must be mutual. And the reason given for the rule is, because, if he be an utter stranger to the fact, it is perfectly *res nova*, between him and the defendant ; and, if it be no prejudice to the plaintiff, had the fate of the verdict been as it would, he cannot be entitled to seek a benefit, for it would be unequal, since the cause is a new matter between the parties, that the jury should be swayed by any prejudice ; (Gilb. L. E. 1 Stark. 195, in note) ; and because the former verdict may have been obtained upon the evidence of the party, who seeks to take advantage of it. That these are general rules, there can be no doubt, and if this case comes within them, the evidence was properly rejected. In assigning the reasons, which induce the court to differ in opinion from the Common Pleas, it will be necessary to attend to the relative situation of the parties. The plaintiff's goods were taken to satisfy the rent alleged to be due, because being on the premises at the time of the distress, the law presumes, (which presumption, from motives of policy cannot be rebutted,) that they are the goods of the tenant. The plaintiff concedes this, and pleads, no rent in arrear ; and alleges, that the matter has been tried by a court of competent jurisdiction, of which, he offers record evidence ; which is opposed, because it is *res inter alios acta*, and on the ground of a want of mutuality. It is contended, that it ought to be admitted as the evidence of a fact, and an adjudication *in rem*. We do not consider the plaintiff in replevin a stranger to the controversy between the landlord and tenant ; on the contrary, the issue between them was one in which he was materially interested ; for if there was no rent in arrear, there was no pretence on which his goods were liable to seizure. If Kessler had been offered as a witness before the justice, would any person say he would have been a competent witness ? And, upon what other principle would he be rejected, than because he was interested in defeating the landlord, and by this means, relieving his goods from distress. You cannot separate their interests ; for, unfortunately for Kessler, they are embarked in the same bottom.

We will now proceed to show some cases, where, merely because they are engaged in the same transaction, although not parties to the judgment, these general principles have been thought most to apply. Thus a suit on a joint and several bond, against each of the obligors, a verdict and judgment for one, which are offered in evidence, or pleaded in favour of the other ; upon what principle is this a defence ; but because, although not parties to the suit, they are so far interested in the same trans-

[Kessler v. McConachy.]

action, as that a verdict and judgment for one, is conclusive for all. But, reverse the case, and suppose the verdict and judgment for the obligee, if evidence *at all, which is questionable, [*444] it certainly would not be conclusive. And here it might be argued, there would be a want of mutuality. In an action, by A. against B., to recover damages, for the value of a slave sold by B. to A., and who had been recovered by a paramount title, by C. from A., the record of the action between C. and A., is evidence of the fact of eviction, and of the damages; but, as is said, not of C.'s title. *Saunders v. Hamilton*, 2 Hayw. 226, 282; *Blasdale v. Babcock*, 1 Johns. Rep. 517; *Tyler v. Ulmer*, 12 Mass. Rep. 166. So, also, if suit be brought against the sheriff, for an escape, and a verdict for the defendant, in an action on the recognisance, the verdict would be evidence for the sureties.

It was not contended, that the record was conclusive; but, *prima facie* evidence of the fact, of no rent in arrear. And, in this view, the case of *Cormack v. The Commonwealth*, 5 Binn. 184, is an authority, which has an essential bearing on the question. It is there decided, that a judgment, in an action against the sheriff alone, of which his sureties had no notice, is *prima facie*, although not conclusive evidence, as to the amount of damages in a subsequent suit, upon the recognisance, against the sheriff and his sureties. And surely, if it was evidence against them, it would be evidence for them, in the event of a different finding, and this would, I conceive, be this very case. The record of a recovery in ejectment, against a covenantor, is not conclusive evidence against the covenantor, if he had no notice of the ejectment. *Leather v. Poultney*, 4 Binn. 356. It was not disputed, but that was *prima facie* evidence.

It is said, the judgment was properly rejected, as being *res inter alios acta*. This I do not understand as confined to judgments, and if it should be construed to extend to every transaction between the landlord and tenant, (and it is difficult to draw the distinction,) it would leave the stranger without remedy. It will hardly be contended, but that the declarations, or admissions of the landlord to his tenant, would be evidence; and if a settlement had taken place between them, the stranger might avail himself of it, and yet it would be liable to the objection of being *res inter alios acta*. A settlement may be given in evidence, but according to the argument of the defendant in error, a judgment confessed upon that settlement cannot. If a landlord recovers judgment, issues execution, and levies the rent by due course of law, it would be singular if the legal satisfaction would not be evidence in a suit between him and a stranger, on whom he had distrained

[Kessler v. M'Conachy.]

for the same rent. What are the consequences of the doctrine? If the tenant had brought the replevin, which he might, the record would have been conclusive on the plea of no rent in arrear. But by excluding the record, you enable the landlord to recover the rent, although it has already been decided by a court of competent jurisdiction that none was due, in a suit in which he had full opportunity of being heard, [*445] *and where there has been an express adjudication, upon the very matter in controversy. One of two consequences must necessarily follow; either the plaintiff is without remedy, or he must bring suit in which he may recover not only the amount of the rent, but his damages and costs. The landlord effects that indirectly, which he has failed to do in a suit between himself and his tenant. This would give an opportunity for collusion between the tenant and the landlord to defraud the stranger, or for collusion between the stranger and the landlord to defraud the tenant. The truth is, they are such privies in interest, as to bring them strictly within the exception to the general rule. The testimony is not liable to the objection, which always struck me as the most forcible, that the judgment may have been obtained upon the evidence of the party who seeks to take advantage of it; for Kessler would have been incompetent on the ground of interest. It does not come within the rule *res inter alios acta*, as that applies to a stranger, which he is not, inasmuch as he has a direct and immediate interest in the suit; nor will the objection of a want of mutuality avail the defendant in error, as although good as a general rule, it is by no means without exception. Evidence may frequently be given against a party, which cannot be heard in his favour.

All that has been heretofore contended is, that the record was *prima facie* evidence. There is, however, a class of cases, which it resembles more in principle than the general rule, to which it has been likened. It is an adjudication *in rem*, upon the precise point in dispute, between the real parties, the landlord and tenant, which binds not only them, but all who stand in the relation of privies in blood, or estate, or privies in law. It is not essential, that either the parties, or the form of action, should be precisely the same; if they are substantially so, it is all that is required. They are substantially the same for all legal consequences to the tenant; for it cannot be doubted, that in case the plaintiff in replevin be bound to pay the rent, the tenant would be answerable over; and this is the principle we have decided in this case, and with, as I understand, the assent of the whole court. If the landlord had distrained the goods of the tenant, he would have been estopped by the

[Kessler v. M'Conachy.]

judgment ; but, as he has thought proper to proceed against the goods of a stranger, it is contended, it is not even *prima facie* evidence.

The record is admissible on another principle. A judgment, ascertaining a precise fact, character, or privilege, is always evidence, whenever that fact, character, or privilege, comes in question between other parties. 2 Str. 1109 ; 5 Burr. 2601 ; 1 Burr. 146 ; 9 Mod. 66 ; 1 Stark. on Ev. 188 ; 7 Cranch, 318. The admissibility of the judgment, to prove the fact itself, and with a view to its legal consequences, is on the ground, that every such judgment may be considered as operating *in rem*. 1 Stark, 188. The fact in issue was, that there was no rent in arrear, asserted by one, and denied by the *other ; and it is no answer to say, that it goes the whole length of supporting the plaintiff's action. It [*446] will be observed that the plaintiff in replevin does not insist upon the judgment as an estoppel, (which he might, it being substantially a trial between the tenant and landlord,) but merely offers the record as *prima facie* evidence of the fact, of no rent in arrear. And what better or more unexceptionable proof could there be of that fact ; to what objection is it exposed ? The landlord had a full and fair trial before a court of competent jurisdiction. He acquiesces in the decision of the justice, and is estopped to deny the truth of the finding ; and yet he contends, it is not even evidence in a suit where the precise point is in issue, between him and a person whose goods were only liable because they were on the demised premises at the time of the distress. If this should be the law, in cases where it had been adjudged there was no rent due, the landlord will merely have to watch when the goods of a stranger are upon the premises, on which he may distrain, and by this means, avoid the legal consequences of a judgment against him.

GIBSON, C. J., dissented as to the admissibility of the judgment given by the justice of the peace, and gave the following opinion :

As to one point, I regret that I cannot concur in the opinion just delivered. It is an admitted rule that no one shall have advantage from a judgment, who would not have been prejudiced by it ; and, if there be any imaginable case to which it is applicable, it seems to me this is one. I do not see how it can be maintained, that there was privity between the plaintiff and the tenant. The goods were distrained merely because they happened to be on the premises, and not in consequence of any supposed relation of the parties. It is, however, urged with some

[Kessler v. M'Conachy.]

plausibility, that as the owner would have an action against the tenant for money paid to his use, the landlord would be able, notwithstanding the judgment in favour of the tenant, to recover the rent from him circuitously. But would the judgment be evidence against the owner of the goods, (for that is the test,) in case it had been in favour of the landlord? The owner certainly would not be the less a stranger, because he would have his action over against one who might not be worth a shilling. But a verdict and judgment operate as an estoppel, which Lord Coke says, Co. Litt. 352, *a*, binds only parties and privies; so that a stranger shall neither take advantage of it, nor be bound by it; and in specifying the different sorts of privity that may exist in the law, 3 Co. 23; 4 C. 123, he says not a word about privies in responsibility. In *Patton v. Caldwell*, 1 Dall. 419, such privity was held to be insufficient to introduce a verdict against one underwriter to affect the others, without an agreement on their part to be bound by it. The best writers say that a judgment is evidence only against those who claim as privies in blood, or estate, or in law. Stark. Ev. part II. 192; 1 Phil. Ev. 245; neither [*447] of which includes *the owner's case; and if he be neither party nor privy, I can see nothing to take it out of the general rule. Those instances which are usually adduced as exceptions, are in fact not so; the record being received, not as evidence of the fact adjudicated, but as being the very fact. On this elementary distinction, which is illustrated in *Burr v. Gratz*, 4 Wheat. 213, we ruled the case alluded to, as having been decided in 1827, at Pittsburg. There, a defendant in ejectment, who had set up an old title in a third person, was permitted to show the record of a recovery by such third person against the plaintiff in the action at bar, not to prove that the stranger had the better title, (the fact adjudicated,) but to rebut a presumption from lapse of time, of his having abandoned it; and, to that end, the judgment was held competent as a distinct and independent fact. Now, for what was the judgment of the justice offered here? Not to show the naked existence of a proceeding between the landlord and the tenant, or that the tenant denied that anything was in *arriere*—and without operating as an estoppel, it could prove nothing else—but to show the fact adjudicated, that no rent was in truth due when the distress was made. Mr. Starkie speaks of the object for which a judgment may be offered; whether with a view to establish the mere fact, that such a judgment was pronounced, and the legal consequences of such fact, or as a medium of proving some fact found by the verdict: and, where such fact has been found in a matter of private right, in regard to which the reputation of the country would be inadmissible, he says, the record is

[Kessler v. M'Conachy.]

clearly incompetent to prejudice or benefit a stranger; Treat. Ev. part II. 182, 186, 187; the excepted cases being, where the proceeding was *in rem*, to which all the world is in law a party, or where the matter is of a public nature, to which all the world is in fact a party. Now, the judgment here was certainly *inter partes*, and in a matter of private right; and, what are its legal consequences as divested of those incidents that would appertain to it between parties or privies? Certainly not the establishment of the fact found by the justice, that no rent was in arrear, and an estoppel of the landlord to deny it. There are, however, material consequences, which sometimes proceed from a judgment nakedly considered as an occurrence or an act; such, for instance, as the justification of an executor in paying a debt *bona fide* recovered of him, whether it was originally just or not; and such are the consequences to which the elementary writers allude. But, if the judgment, here, were offered to produce any other consequence than to establish the fact found by the justice, I am unable to perceive it.

The rules of evidence are founded, no doubt, in technical reason. But we must not forget that it is not reason, but convenience which requires that a judgment be conclusive in any case. But that it should ever after prevent an injured party from showing the truth against all persons, is required neither by reason nor convenience. *That a judgment should not conclude one who had no opportunity to contest the [*448] matter, seems to be required by the plainest principles of natural justice; and, on the other hand, that mutuality of advantage, which has become the foundation of a familiar maxim of equity, equally requires, that he should not derive a benefit from it. But, however we may esteem the law of evidence, it ought not to admit of a question, whether its obligation be not paramount to all considerations of reason or expediency. Systems of jurisprudence are necessarily complex and artificial; and, although the law of evidence be not the perfection of reason, justice will, perhaps, not be promoted by relaxing any of its rules.

I am not, however, for rejecting the record, merely because the proceeding was instituted subsequently to the distress. It was offered to prove a pre-existing fact; and evidence is not the less competent, because it has arisen since the inception of the proceeding in which it is produced. Nor do I rely on the denial of the right of appeal, by which the landlord is effectively deprived of a trial by jury; a circumstance which ought, perhaps, to exempt this particular case. My objection is founded on the general rule, as I have stated it; according to which, it seems to me, the record was properly excluded.

[Kessler v. M'Conachy.]

TOD, J., dissented on the same point, but only because the proceedings before the justice were instituted after the landlord had distrained.

Judgment reversed.

Cited by Counsel, 2 Penn. R. 287; 2 M. 41, 268; 4 R. 409; 5 Wh. 11, 277; 2 W. 350; 3 W. 131, 325; 5 W. 497; 6 W. 428; 8 W. 545; 2 Barr, 287; 8 H. 203; 10 H. 148; 11 H. 158; 2 C. 386; 5 C. 143; 2 Wright, 342; 7 Wright, 409; 2 S. 294; 5 S. 211; 7 S. 273; 9 S. 423; 12 S. 11, 137; 16 S. 426; 17 S. 106; 19 S. 328; 24 S. 389; 1 W. N. C. 336; 11 W. N. C. 217.

Cited by the Court, 10 N. 353; s. c. 9 W. N. C. 138; 11 N. 90.

As to the question of evidence, this case was cited in 6 Wh. 190, and distinguished in 2 W. 350. The late cases on distress are, 6 N. 438; 7 N. 93; 10 N. 349; 2 W. N. C. 371; 7 W. N. C. 64; 8 W. N. C. 533; 9 W. N. C. 574.

[SUNBURY, JUNE 25, 1829.]

Willard *against* Parker and Another.

IN ERROR.

A suit cannot be maintained by the supervisors of the roads, after they have gone out of office, against the county treasurer, upon an order drawn on him by the commissioners, in favour of the supervisors, or their successors in office.

It seems, however, that if the supervisors had worked upon the roads, to the amount of the order, or had paid others for their labour, they might have acquired such an interest in the order as would have enabled them to sustain a suit for their own use.

Where the treasurer has received money due for road taxes, he is bound to pay it to the supervisors; and has no right to make payments in county orders.

The mode of proceeding, on the part of the supervisors, pointed out by the fourth section of the act of the 6th of April, 1802, prescribing the manner of settling their accounts, must be strictly pursued.

ON a writ of error to the Common Pleas of *Tioga* county, it appeared, that this was an action of assumpsit, brought by George Parker and Samuel Rathbone, for the use of Samuel [*449] *Rathbone, against William Willard, Jr., on an order, of which the following is a copy :

"Commissioners' Office, Wilkesbarre, May 17, 1825.—Pay George Parker and Samuel Rathbone, supervisors of Elk-land township, or their successors in office, the sum of one hundred and twenty-five dollars and sixty-five cents, amount of the moneys arising from road tax, in said township, so fast as the same comes into your hands, for the year 1825.

"To the treasurer of { WILLIAM KNOX, }
Tioga county { ELIJAH STYLES, } Commissioners."
DAVID LINDSEY, clerk.

[Willard v. Parker and another.]

When the order was drawn, Knox and Styles were the commissioners of Tioga county; and Parker and Rathbone, the supervisors of Elkland township; but the plaintiffs were not in office, at the commencement of the suit. The defendant was the treasurer, and received the money arising from the road tax, for Elkland township, for the year 1825. This order, with others, was credited to the amount of the road tax, for that year. After the money was received, it was demanded of Willard by the plaintiffs; and Willard offered to pay part in county orders, and part in cash; which was refused. The question submitted to the court, was, whether the plaintiffs, on these facts, without any proof of an express promise, could recover. In the court below, the plaintiffs had judgment.

Lewis, for the plaintiff in error said, that the order in question, was drawn under the provisions of the seventh section of the act of the 6th of April, 1802, Purd. Dig. 721; and the first section of the act of the 30th of March, 1811, Purd. Dig. 730, which require the treasurer to pay the money received by him, for road taxes to the supervisors, for the time being. The order was not private property; and was not the foundation of a suit by the supervisors as individuals. After their term of office had expired, no suit could be maintained by them, because the interest in the order had passed to their successors.

Williston, contra, answered, that the plaintiffs below had settled for this order with the auditors; and, thus it had become their private property.

To this *Lewis* replied, that nothing like that appeared in the record.

The opinion of the court was delivered by

ROGERS, J.—It is contended, that the plaintiffs cannot recover, because the suit is brought for the benefit of one of the supervisors; that the order is given, to them, as the representatives of Elkland township, and to their successors, and that they ceased to be supervisors before the commencement of the suit. In this decision we do not wish to be considered as commending the conduct of *the treasurer, who it is apparent, refused to pay the plaintiffs, not because in his judgment, they [*450] were not the proper parties to receive, but because they would not permit him, who had received par money for the taxes, to pay them in depreciated county orders. This spirit of specula-

[Willard v. Parker and another.]

tion, at the expense of the public interest, cannot be too much condemned; and, it is proper that it should be discouraged by the court; nor am I altogether certain, whether the conduct of the treasurer has not subjected him to an indictment, as guilty of a high misdemeanor in office. If we are governed by the face of the order, it is plain, that the term supervisors, is not merely descriptive, but intended as a designation of the character, in which they are to be entitled to the money, that is, in their representative character of supervisors of the township. The order is to George Parker and Samuel Rathbone, supervisors of Elkland township, or their successors in office. When, therefore, they ceased to be supervisors, their interest in the order also ceased, and became vested in their successors. And, whether the supervisors of the township be a corporation or not, does not matter, as suit may be brought (provided suit lies against the treasurer, under such circumstances,) in the name of the commissioners, for the time being; who would describe themselves, as the successors, designated and intended in the order. No person can believe that the commissioners intended to vest an absolute right in the supervisors to the money, to be applied by them to their own private purposes, without regard to their public duties. The order was drawn in strict conformity to the first section of the act of the 30th of March, 1811. I will not say, that, if the supervisors had worked on the roads, to the amount of the order, or had paid others for their labour, they might not acquire such an interest, in the order, as to enable them to sustain suit for their own use; but this I will not suppose without proof. The supervisors of the township, although not in strictness a corporation, yet, for certain purposes, are *quasi* a corporation; so that an order in favour of the supervisors, and their successors, would enable the successors to sustain suit, in their own name, for the use of the township. We particularly object to the practice of using township orders for private purposes, in payment of the private debts of the supervisors, or for goods purchased for their use. In every such case, we consider it a most flagrant abuse, as money, where it can be had, should be received from the treasurer, whose duty it is, under the first section of the act of the 30th of March, 1811, on receiving the taxes, or any part thereof, to pay over the amount to the supervisors, who shall respectively be entitled to the same; with which it is their duty to make, open, and repair the public roads. And this construction may prevent abuses, without any injury whatever to the honest supervisors; for the fourth section of the act of the 6th of April, 1802, particularly prescribes the manner of settling their accounts. At the election

[Willard v. Parker and another.]

for choosing supervisors, the *electors are required to elect four capable and discreet freeholders, or inhabitants [*451] to settle and adjust the accounts of the supervisors, whose time is about to expire. The supervisors are required, on the 25th of March, yearly, or within ten days thereafter, to produce fair and clear accounts, of all such sums of money by them received, &c. And the freeholders and inhabitants so chosen, &c., have full power to adjust, and settle such accounts, and to allow such sums and charges, as they may think reasonable. And the section further directs, that, if there shall appear to be any money remaining in the hands of the supervisors, they shall, by order in writing, &c., direct the same to be paid to the succeeding supervisors; but, in case they shall be found to be in advance, &c., the freeholders are required to give an order to reimburse the same, as soon as a sufficient sum of money shall come into their hands. This section clearly points out the mode of proceeding, on the part of the supervisors, which, it is the opinion of the court, should be strictly pursued. It is manifest from this act, and the first section of the act of the 3d of April, 1804, the legislature intended to prevent the traffic, which appears to have taken place in township orders. As a considerable part of the money arises from taxes on unseated lands, which are held by nonresidents, it is paid in par money; and this the treasurer is bound to pay over, as he received it, to the supervisors, to be by them faithfully expended in making, opening, and keeping in repair the public highways. The presumption is, this course was pursued, and if so, the supervisors, by producing the order, and showing the money had not been received, would have had an allowance to that amount, and it would have been their duty to deliver over the order to their successors in office; if they were in advance, &c., they would have been entitled to an order on their successors, who would have been bound to reimburse them out of the first money received.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 8 W. 127; 3 C. 111; 4 O. 299; s. c. 13 W. N. C. 293.
Approved and followed, 3 R. 350.

[*452]

*[SUNBURY, JUNE 25, 1829.]

Gibson *against* Todd, Administrator of Beale.

IN ERROR.

An action on a judgment obtained by husband and wife, for a debt due to the husband in his own right, should, after the death of the husband, be brought in the name of the wife, as surviving plaintiff, and not in the name of the administrator of the husband. But the court will protect the rights of creditors, and others who are shown to be equitably interested in the judgment.

An agreement by the defendant, with the husband in his lifetime, to give him credit in a larger debt, which he had against him, is, if executed, an extinguishment of the judgment; and if not executed, it is not a reduction of the judgment into possession, by the husband.

If the plaintiff omit in his declaration, to aver a fact essential to his recovery, and the defendant demur to the declaration, the plaintiff cannot introduce into his joinder in demurrer, an averment of such fact. The proper course, is to ask leave to amend the declaration; which, if the court grant, they will at the same time permit the defendant to withdraw or insist on his demurrer.

ON the return of the record of this case from the Court of Common Pleas of *Mifflin* county, it appeared that Thomas Todd, administrator of Thomas Beale, brought an action of debt on a judgment obtained by Thomas Beale and Elizabeth, his wife, against David Gibson, the plaintiff in error, in which the following declaration was filed:—

“And whereupon the said Thomas Todd, administrator of Thomas Beale as aforesaid, comes and complains of the said David Gibson, for this, that heretofore, to wit, on the 8th day of February, in the year 1819, at the county of Mifflin, in the Court of Common Pleas of the said county, then and there holden, the said Thomas Beale and Elizabeth, his wife, for a debt due to the said Thomas Beale in his own right, by the consideration and judgment of said court, recovered against the said David Gibson, the sum of one hundred and seventeen dollars and thirty-two and a half cents, of debt, together with thirteen dollars and fifty-nine cents of cost, in the whole one hundred and thirty dollars ninety-one and a half cents besides the accruing costs above demanded, which in and by the said court, were then and there adjudged to the said Thomas Beale, and Elizabeth his wife, for his damages which he had sustained, as well by reason of the nonperformance, by the said David Gibson, of certain promises and undertakings, then lately made by the said David, to the said Thomas, as for his costs and charges by him in that behalf about his cause expended, whereof the said David was convict, as by the record and proceedings thereof re-

[Gibson v. Todd, Administrator of Beale.]

maining in the court at Lewistown, No. 43, November Term, 1818, more fully appears, which said judgment still remains in full force and effect, not reversed, satisfied, or otherwise *vacated, and the said Thomas Beale in his lifetime, or the [*453] said Elizabeth, or the said administrator since his death, hath not obtained any execution of or upon the said judgment, so rendered, as aforesaid. Whereby an action has accrued to the said Thomas Todd, administrator, as aforesaid, to demand, and have of and from the said David Gibson, the said sum of one hundred and thirty dollars ninety-one and a half cents, with interest and accruing costs; yet the said David Gibson, although often requested, hath not yet paid to the said Thomas Beale, or Elizabeth his wife, in the lifetime of the said Thomas, or to said Elizabeth, or to said administrator since his death, the said sum of one hundred and thirty dollars and ninety-one and a half cents, or any part thereof, but heretofore hath refused, and still doth refuse, to render the same; whereby the said Thomas Todd, administrator, as aforesaid, saith he hath damage ten dollars."

An additional count was afterwards filed as follows:—

And the said Thomas Todd, administrator, as aforesaid, avers that the said David Gibson, so being indebted as aforesaid, to the said Thomas Beale, and Elizabeth his wife, for the amount of the judgment and costs, as aforesaid, to wit, one hundred and thirty dollars and ninety-one and a half cents, and by virtue of said judgment, on the 8th day of February, 1819, at the county of Mifflin, and it was then and there agreed, by and between the said David Gibson, and the said Thomas Beale, that whereas the said Thomas Beale, was indebted to the said David Gibson, as one of the administrators of Thomas Gibson, in a sum greater than the amount of the debt and costs so due, as aforesaid, by the said David to the said Thomas, and Elizabeth his wife, that the said David, should and would allow a credit to the said Thomas, for the aforesaid sum of one hundred and thirty dollars and ninety-one and a half cents, for and toward the sum, due by the said Thomas, to the said David, and one William Gibson, as administrators of Thomas Gibson, for the price of a tract of land, sold to said Thomas Beale, by the said David and William; whereby, and by reason of which premises, the said Thomas Beale, had in his lifetime reduced the said judgment, for one hundred and thirty dollars and ninety-one and a half cents, into possession; yet, nevertheless the said Thomas Todd, administrator, as aforesaid, avers that after the death of the said Thomas Beale, the said David Gibson, fraudulently intending to deceive and injure the said Thomas Todd, as administrator, of the said Thomas Beale, neglected and refused to

[*Gibson v. Todd, Administrator of Beale.*]

give credit to the said Thomas Todd, as administrator of said Thomas Beale, for the said sum of one hundred and thirty dollars and ninety-one and a half cents, as aforesaid, on account of a certain debt due by said Thomas Beale, in his lifetime, to the said David Gibson, and one William Gibson, administrators of Thomas Gibson, in part of the price of a tract of land bought by the said Thomas Beale, in his lifetime, of the aforesaid [*454] David and William Gibson, as *administrators of Thomas Gibson, as aforesaid, whereby and by reason of which premises, the said judgment, No. 43, of November Term, 1818, remains wholly due and unpaid, to wit, the sum of one hundred and thirty dollars and ninety-one and a half cents, with interest from the 8th of February, 1819, and which said judgment still remains in full force, not reversed, satisfied, or otherwise vacated ; and the said Thomas, administrator, as aforesaid, avers that the said Thomas Beale, in his lifetime, or said administrator since the death of said Thomas, hath not obtained execution of the said judgment against the said David. Whereby an action hath accrued to the said Thomas Todd, administrator, as aforesaid, to have and demand of and from the said David Gibson, the said sum of one hundred and thirty dollars and ninety-one and a half cents, with interest and accruing costs ; yet, nevertheless the said David Gibson, although often requested, hath not yet paid the same to the said Thomas, in his lifetime, nor to the said Thomas, administrator, since the death of the intestate, nor in any way satisfied the same, but hitherto hath refused, and still doth refuse to pay the same, to the damage of the said Thomas, administrator, as aforesaid, ten dollars, and for this he brings suit, &c.

The defendant demurred to the declaration, and assigned for causes of demurrer, "That in the first count it manifestly appears, that the suit upon which the judgment No. 43, in said declaration mentioned was obtained, was brought in the name of Thomas Beale, in his lifetime, and Elizabeth his wife, and the said Elizabeth is still in full life, and has survived her said husband Thomas Beale ; and that by the law of the land, the interest and property of said judgment, and all moneys due thereon, became and are vested in the said Elizabeth. And also, that the allegations and averments in the second count of said declaration, do not prove that the said Thomas Beale, in his lifetime had reduced the said judgment, No. 43, to his possession, but, on the contrary, the said allegations and averments, in the second count of said declaration mentioned, show, if they show anything, that the said judgment was satisfied."

"And also for that the said two counts are inconsistent, and

[Gibson v. Todd, Administrator of Beale.]

set forth no legal causes whereby the said Thomas Todd, administrator of Thomas Beale, deceased, is entitled to recover in his suit. And that the said declaration is in other respects uncertain, informal and insufficient, &c."

The plaintiff filed a joinder in demurrer in these words:—

"And the said Thomas Todd, administrator of Thomas Beale, comes into court, and avers that his intestate, the said Thomas Beale, died insolvent, not having sufficient assets real or personal, to pay and satisfy his just debts, and the said plaintiff further says, that the matters and allegations as above set forth by him in his said declaration, are good and sufficient in law to enable him to have and maintain his aforesaid action thereof against the said David Gibson. And of this he prays the judgment of the court, &c."

*In the Common Pleas judgment was given for the plaintiff, and the defendant took out a writ of error, [*455] which was argued by *Hale*, for the plaintiff in error, who cited, Arch. Pl. 274; Co. Litt. 304; 1 Fonb. 313; 2 Com. D. 234; 1 Vern. 396; Cro. Eliz. 6; 2 P. Wms. 497; 1 Atk. 726.

Fisher, contra, referred to 2 Vern. 683.

The opinion of the court was delivered by

ROGERS, J.—Equity is part of the law of Pennsylvania; but, from what has been considered by some a defect in our jurisprudence, it is always administered through the medium of common law forms. The record presents a case of a joint judgment, on which the proper remedy, is in the name of the survivor, the legal owner, whether the remedy be by execution, or action of debt, or a *scire facias*. It has ever been held a decisive objection, that suit has been brought in the name of the equitable, and not the legal owner; for it has always been considered essential, to preserve the forms and boundaries of actions, which are not to be departed from, or varied without the most absolute necessity. *Glass and another v. Stewart*, 10 Serg. & Rawle, 224. By adopting the legal form, no injustice will be the result, and but little inconvenience, as the court will take care to protect the interest of the equitable owner. The object of the plaintiff would seem to be, to raise the question, whether the wife was a trustee for the creditors, or takes the avails of the judgment in her own right, and this could have been as well attained by a suit in the name of the wife, for the use of the administrators, who represent the creditors. In relation to the merits, we take the rule to be this: when a husband takes a joint obligation to himself and wife, for a debt due to himself alone, it is a gift to the wife, who takes as a joint purchaser, and by survivorship, and in her

[Gibson v. Todd, Administrator of Beale.]

own right, unless the proceeds should be wanted on a deficiency of assets, for the payment of creditors or perhaps legatees. *Christ's Hospital v. Budgin and Wife*, 2 Vernon, 683. The remedy is in chancery, which grants relief, because otherwise, the husband, by joining his wife in the security, might defraud his creditors. But when the wife is the meritorious cause of action, as in the case of a bond to her *dum sola* or a legacy, and the husband joins her in the security or suit, she takes by survivorship, and for her own use, although there may not be assets without this money, for the payment of debts or legacies. And the reason of the distinction is, that in the latter, although not in the former case, she has not only the legal title, but a superior equity, and the invariable principle of a Court of Chancery, is not to relieve against a legal title where the respondent has an equal, or superior equity. The Chancellor simply refuses to interfere, and leaves the parties to their legal rights. This always supposes that the husband has not reduced the chose in action into possession.

Waiving the want of proper parties, we will next consider this [*456] *case on the demurrer. We will in the first place premise, that the demurrer admits only what has been properly pleaded. The plaintiff omits to aver in his declaration the insolvency of Beale, and this we have seen is the only ground of relief, for equity interposes only in favour of creditors or perhaps legatees, 2 Vern. 683; and *non constat*, that the assets may not be abundantly sufficient to answer all legal demands of creditors and legatees. The pleader seems to have been aware of this, for we find him endeavouring to remedy the defect in his declaration, by an averment in the joinder to the defendant's demurrer. This, to say the least of it, is a novel procedure, and was intended to make the defendant admit by the demurrer, what he never had an opportunity of traversing. The plaintiff, instead of concluding with a verification, which he is bound to do when he avers a new fact, closes the pleading by praying judgment of the court, &c. Having discovered the slip in the pleading, the course of the plaintiff was perfectly plain, by motion to the court for leave to amend his declaration; which, if they had thought proper to grant, they would at the same time have permitted the defendant to withdraw or insist on his demurrer.

The plaintiff further avers an agreement between the defendant and Thomas Beale, in his lifetime, that, as Thomas Beale was indebted to David Gibson, the defendant, one of the administrators of Thomas Gibson, in a sum greater than the amount of the debt and costs in the suit, David would allow a credit to Thomas Beale, for the sum of one hundred and thirty dollars

[Gibson v. Todd, Administrator of Beale.]

and ninety-one and a half cents, in part payment of said debt. This allegation is made for the purpose of showing that Thomas Beale, in his lifetime, reduced the judgment into possession. What purposes the plaintiff's counsel expected to answer by this averment it is difficult to conceive; for as the demurrer admits that such an agreement was made, if it had been executed, it would have been an insurmountable obstacle to the plaintiff's recovery; for it would have shown that the judgment, which is the foundation of the suit, was extinguished or satisfied. The plaintiff avers the contract, but not the execution of the contract, and this in truth he could not do, as there is no doubt the contract was rescinded by the defendant in refusing to give the credit, and by the plaintiff in prosecuting this suit, which is in disaffirmance of the contract.

Judgment reversed.

Cited by Counsel, 1 W. & S. 518; 4 W. & S. 19; 8 W. & S. 119.

*[SUNBURY, JUNE 25, 1829.]

[*457]

Mevay against Edmiston.

IN ERROR.

An action for the penalty given by the act of the 28th of March, 1814, for taking illegal fees, may be arbitrated under the act of the 20th of March, 1810.

WRIT of error to the Court of Common Pleas of *Mifflin* county, in an action of debt, brought by Mevay against Edmiston, to recover the penalty of fifty dollars for taking illegal fees as sheriff. The suit was commenced before a justice, who gave judgment for the plaintiff. The defendant appealed, and entered a rule of reference in the Court of Common Pleas. The arbitrators found in favour of the defendant, and the court refused to set aside the reference and report.

Fisher, for the plaintiff in error, insisted, that the arbitrators had no jurisdiction of the cause, and cited, *Buckwalter v. The United States*, 11 Serg. & Rawle, 193; *The Commonwealth v. The Commissioners of Philadelphia County*, 8 Serg. & Rawle, 151; *Respublica v. Cobbett*, 2 Yeates, 352; *Reed v. Cist*, 7 Serg. & Rawle, 183.

Wilson, contra, answered, that the act of the 28th of March,
VOL. I.—33 513

[Mevay v. Edmiston.]

1814, under which this action is brought, places the forfeiture on the footing of any other debt, as regards the mode of recovery. He cited *Prior v. Craig*, 5 Serg. & Rawle, 44; *The Commonwealth v. Bennett*, 16 Serg. & Rawle, 243.

The opinion of the court was delivered by

GIBSON, C. J.—A criminal prosecution, whether it be by indictment or action, is not within the purview of the compulsory arbitration act; as in the case of an action to recover a penalty for a breach of the revenue laws. *Buckwalter v. The United States*, 11 Serg. & Rawle, 193. On the other hand, an action for a penalty which is imposed, not to punish the act as an offence, but to compensate the party aggrieved, as in the case of a penalty for omitting to serve notice of the meeting of arbitrators, which is strictly a private injury, may be referred at the option of either party. *The Commonwealth*, for the use of *Rogers v. Bennett*, 16 Serg. & Rawle, 243. What is the character of taking illegal fees in violation of the act of the 28th of March, 1814? The fact constituted the crime of extortion at the common law; but, by the twenty-sixth section, a penalty is given to the party injured, to be recovered “as debts of the same amount are recoverable;” from which, it would seem, that the legislature intended to repeal the common law as respects extortion committed in violation of this act; in other words, to change the character of the injury from a public [*458] to a private *wrong. And this appears the more satisfactorily, not only because it has been directed in a previous law, that a remedy provided by statute should be pursued in exclusion of the remedy at the common law, but because the means of prosecution are put, in every respect, expressly on the footing of an action for a private injury. This provision alone, then, if other arguments were wanting, would be decisive of the question; and we are satisfied that the reference was valid.

HUSTON, J., was absent, in consequence of indisposition.

Judgment affirmed.

Cited by Counsel, 8 W. 530; 12 S. 42; 6 N. 90.

[SUNBURY, JUNE 25, 1829.]

Wilbur against Strickland.

IN ERROR.

A sheriff is answerable for the conduct of his deputy in taking goods of another person than the defendant in execution.

After evidence of a fraudulent combination, the declarations of any one of the parties to it may be proved.

ERROR to the Court of Common Pleas of *Bradford* county.

This action of trespass was brought in the court below by Amos Strickland, claiming to be owner of certain goods, which had been levied on by a deputy of Reuben Wilbur, the sheriff of the county, on *feri facias* issued against John B. Farr, at the suit of Eason Baily. A great deal of testimony was given on the trial, which, from the clear and condensed view taken of it in delivering the opinion of the court, it is unnecessary here to set forth. Two points were made in arguing the writ of error.

Williston, for the plaintiff in error, suggested, that it was at least doubtful, whether a sheriff was answerable for the acts of his deputy, if he exceeded his delegated authority; and quoted, Bac. Ab. title Sheriff, 443. But he relied more strongly on the court having rejected evidence of declarations made by Farr, that the property was his own; and that he had put it into the possession of Strickland to place it beyond the reach of his creditors; which evidence was offered, after proving by a number of witnesses, that Farr was, at the time of the levy, and for a long time before, had been, in the sole possession of it, and had exercised various acts of ownership over it. After evidence of a fraudulent combination, it is competent to prove the declarations, as well as the acts of any of the persons implicated in the fraud. He cited, *Babb v. Clemson*, 10 Serg. & Rawle, 426.

Lewis, for the defendant in error, on the first point quoted, 2 Bl. Rep. 832. In regard to the second question, he commented at large upon the evidence, with an endeavour to show, that combination *and fraud were not proved; but ad- [*459] mitted, that if they had been fully and clearly made to

[Wilbur v. Strickland.]

appear, the evidence ought to have been received. He cited under this head, *Wolf v. Carothers*, 3 Serg. & Rawle, 240, and *Phoenix v. Ingraham's Assignees*, 5 Johns. 428.

The opinion of the court was delivered by

SMITH, J.—The defendant in error brought an action of trespass in the Court of Common Pleas of Bradford county, against Reuben Wilbur, the plaintiff in error, for taking, seizing, and carrying away his goods, of the value of two hundred dollars. A verdict and judgment were rendered for the plaintiff below; and in the course of the trial, it appeared, that Reuben Wilbur, the defendant, (while sheriff of that county,) had, (by virtue of a *fiery facias*, issued upon a judgment obtained by Eason Baily against John B. Farr,) levied, by a deputy, on personal property, claimed by Amos Strickland, the plaintiff. The deputation from sheriff Wilbur, dated on the 26th of January, 1827, was to execute the *fiery facias* at the risk of Eason Baily, plaintiff in the execution. Amos Strickland, the plaintiff, offered to prove, that the deputy, professing to act under the authority of the deputation and execution, committed a trespass in taking his property; to which offer the defendant objected, on the ground, that as the deputation was a special one, Reuben Wilbur, the defendant, was not liable. The court, however, admitted the evidence, which forms the first bill of exceptions, and is now assigned for error. The evidence was properly admitted, for it has been settled, that if on a *fiery facias* against A. a bailiff takes the goods of B., trespass lies against the sheriff, and for this I refer to 2 Bl. Rep. 832, and *Hazard v. Israel*, 1 Binn. 240. See 3 Wils. 309, and Dougl. 40, where it is expressly so decided. For all civil purposes, the sheriff is answerable in an action of trespass for the conduct of his deputy. Indeed, on the argument, the counsel for the plaintiff in error did not press this objection.

The plaintiff below claimed the property in question, "under a transfer to him from John B. Farr, and as security to him for having signed an obligation with John B. Farr for about seventy dollars. If he, Strickland, should have to pay the debt, the property to be his absolutely;" and he alleged that he did pay it. On the trial, the defendant having proved, by many witnesses, that John B. Farr continued in possession of the property; used it as his own; repeatedly said it was his; exercised every act of ownership over it; traded with the horses in 1826; often offered to trade them away; did exchange one of them; and, in the presence of the plaintiff, Strickland, after the transfer, said the horses were his own, which was not denied by

[Wilbur v. Strickland.]

Strickland ; and, having, moreover, proved by Samuel Roberts, that John B. Farr had purchased the horses, wagon, and harness, from him, some time before the sale, or transfer ; further, offered to prove by Roberts, " that when he let John *B. [*460] Farr have the horses, wagon, and harness, Farr said, that he had a particular friend on the creek in whose possession he was going to put the property, to keep it out of reach of his creditors, and that that friend was Amos Strickland ;" to which offer the plaintiff's counsel objected, and the court sustained the objection, and rejected the evidence. This is now also assigned for error. In *Reitenbach v. Reitenbach*, at the last May Term, for the Lancaster district, this court decided,* that the declarations of a party, after establishing, or proving a combination to do an illegal act, are not only evidence against the party making such declarations, but are also evidence against all others of the combination, who are made equally responsible for the consequences. In principle, then, the case referred to is decisive of the present. We think the evidence ought to have been admitted. It would have been, if proved, important evidence to show how the matter really was, and it was calculated to prove in what character the goods were placed in the possession of Strickland. It is true, that subsequent declarations by a party to a sale, or transfer of property, which go to take away a vested right, are not admissible evidence. But this is not the case here ; the evidence was offered to show, that the transfer to Strickland was entirely colourable, fraudulent and void ; and this too, after the defendant had proved, by a host of witnesses, that the property continued with John B. Farr, nearly in the same way, at least, that he occupied and used it as his own, after, as before the sale, and that he exercised over the property every act of ownership of which it was susceptible ; in short, that he used it after the transfer as he had done before. Under such circumstances, the evidence was certainly competent, and should have been permitted to go to the jury. After a transfer of personal property, the possession thereof should be entirely and exclusively by the vendee, and should be given up to him by the vendor ; if *bona fide*, the vendee becomes the true owner, and may lend or give it to whomsoever he pleases ; but, on a contest about the property, it would become a question for the jury to say, whether the transfer was *bona fide*, a real sale, and, whether by it, an actual change of property had been made. I refer on this subject to 5 Serg. & Rawle, 275, and 10 Serg. & Rawle, 426. But on the authority of the decision of this court,

* *Ante*, page *362.

[Wilbur v. Strickland.]

in Reitenbach v. Reitenbach, and the cases there cited, we are of the opinion, that the declarations of John B. Farr ought to have been received by the court, and that the judgment must, for this reason, be reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 3 Wh. 410; 9 W. 440; 14 Wright, 62; 5 S. 395.



INDEX.

[References are to the top paging.]

ACTION.

See ARBITRATION. HUSBAND AND WIFE, 2. SUPERVISORS, 1, 2.

1. The plaintiff being the defendants' supercargo, sold their goods on credit at a foreign port, and procured from a house at that port advances, on an assignment of the debts due from the purchasers of the cargo. These advances he remitted to his shippers in a return cargo. In his account of sales of the outward cargo rendered to one of the shippers, he did not mention the names of the purchasers, but concluded it with "errors, omissions, and outstanding debts excepted." In that rendered to the other shipper he mentioned the names of the purchasers, and concluded the account with "errors and omissions excepted." The purchasers having become insolvent, the foreign house which had made the advances, attached the plaintiff's property and recovered the amount of their advances, and the plaintiff brought suit against the consignors for reimbursement. Held that he was entitled to recover. *Elliott and others, Executors of Field, v. Walker and another, Administrators of Wilson*, 126
2. Lease for fifteen years, reciting the intention of the lessees to erect a manufactory of cotton, &c. It was covenanted that if the lessor, his heirs, or assigns, should pay to the lessees the value of such buildings as they should erect, first giving three years' notice of the intention so to do, the lease should expire at the end of fifteen years; otherwise to continue from three years to three years, until such notice and payment should be made, at the same rent. The lessor, for himself and his heirs, covenanted, at his and their cost, to keep the dam, race, &c., in good repair. The value of the buildings was not paid to the lessees. The lease was assigned, and the lessor having died, after having devised the reversion of the premises and other lands, to his five children, the assignee of the lease became, by different conveyances, the owner of three-fifths of the reversion, in fee. The dam and race being out of repair, and the executor of the lessor not having, after notice repaired the same, the assignee expended five hundred dollars in the necessary repairs, and brought an action against the executor of the lessor, to reimburse himself. It was agreed that the breach took place after the death of the lessor, and while the plaintiff was assignee of the lease, and owner of part of the reversion. Held, that the action could not be maintained. *Kershow v. Supplee*, 131
3. It seems, that an action might be maintained against the two devisees who did not comply with the covenant to repair, *Ibid.*
4. Where a person dies intestate leaving a debt or debts unpaid, the children of such intestate cannot maintain a suit for any part of his estate, or the proceeds thereof, against one having the property of such intestate, or holding it as their trustee; but administration must be taken out, and the debts first paid. *Lee v. Wright and others*, 149
5. If a person intermeddle with the goods of an intestate, or the proceeds thereof, and act as executor *de son tort*, no administration being taken out, no trust can be raised in favour of the children as to such property, or the proceeds thereof, or any part of the same, so as to enable them to sue for such property, while the creditors of the estate remain unpaid, *Ibid.*

6. The purchaser at a sheriff's sale, of a ground rent may maintain an action of covenant for the rent, against the owner of the ground out of which it issues. *Streeper v. Fisher and others*, 155
7. The pendency of an ejectment for a lot of ground out of which a rent charge issues, brought by the executors of a testator, will not prevent a recovery in an action of covenant for the rent, by his devisees, . . . *Ibid*.

ADMINISTRATION ACCOUNT.

1. The confirmation of an administration account, like any other decree of the Orphans' Court, cannot be re-examined but by way of review. *M'Lenachan and Wife v. The Commonwealth*, 357
2. But the parties may so modify the balance, as to render it necessary to unravel the account, to give effect to their agreement, *Ibid*.
3. A release by the persons beneficially interested, to one administrator, of everything but certain parts of the estate in the hands of the other administrator, which are specially excepted, is valid, and is to be carried into effect, according to the intention of the parties; and it is competent to the parties interested, to give extrinsic evidence in relation to the parts excepted, notwithstanding the confirmation of the administration account, *Ibid*.

ADMINISTRATOR.

See ACTION, 4, 5. ADMINISTRATION ACCOUNT, 3. HUSBAND AND WIFE, 2.

AGREEMENT.

See COVENANT, 2, 4, 5, 6. HUSBAND AND WIFE, 3.

1. A church, being in embarrassed circumstances, borrowed money of certain banks, for which two of its members gave notes drawn and indorsed by themselves. The banks having required further security, an agreement was entered into, by which, upon a third member of the congregation consenting to become an additional indorser upon the notes, thirty others bound themselves, in default of payment being

made by the church, to make good the deficiency, so that the drawers and indorsers of the notes should not suffer loss, provided the said drawers and indorsers should continue their names on the notes to the end of the time required for the payment of the debt, which it was stipulated should be paid off in ten years, by annual instalments of ten per cent.; and in case the church should make default in paying these instalments, the subscribers to the contract agreed, that the deficiencies should be divided among them in equal parts. The notes were regularly renewed, from time to time, until the death of the last indorser, which took place a few years after the date of the agreement. After his death, his executors were called upon by a committee of the church to renew the notes, which the banks would have permitted under the circumstances of the case. The executors, however, refused to renew, suffered the notes to be protested, and afterwards paid them. After the lapse of several years, they brought this action against the defendant, as one of the thirty who had signed the agreement of indemnity, to recover his proportion of the instalments of ten per cent., which had become due prior to the commencement of the action. Held, that they had substantially complied with the contract of their testator, and were entitled to recover. *Shields and others, Executors of Shields, v. Owens*. 61

AMENDMENT.

See COURT, 3.

An amendment of the declaration may be permitted on a second trial, after the reversal of a former judgment. *Lee v. Wright and others*, 149

ANCIENT DEED.

See EVIDENCE, 1, 3.

APPEAL.

On an appeal from a justice of the peace, though the form of the suit may be sometimes changed, yet the cause of action must be the same as before the Justice. *Caldwell v. Thompson*, 370

APPOINTMENT.

See POWER.

APPRENTICE.

1. The sister of a minor is competent, under the act of Assembly of the 29th of September, 1770, to assent, as his next friend, to binding him apprentice to her own husband. *The Commonwealth, ex rel. Taylor, v. Leeds*, 191
2. But such a transaction will be more strictly scanned than where the binding is to a stranger; and if the contract be tainted with fraud or collusion, the apprentice will be discharged, *Ibid.*
3. He will not, however, be discharged of course, where the covenants appear to be reasonable and proper on the face of the indenture, especially where the application is not made till the apprentice has ceased to be a burden, *Ibid.*

ARBITRATION.

An action for the penalty given by the act of the 28th of March, 1814, for taking illegal fees, may be arbitrated under the act of the 20th of March, 1810. *Mevay v. Edmiston*, 457

ARBITRATORS.

It is competent to prove by the oath of arbitrators, that certain matters were not examined or acted upon by them, and that consequently they had made a mistake in their award. *Roop v. Brubacker*, 304

ASSIGNEE.

See JUDGMENT, 2. SET-OFF, 1.

ASSIGNMENT.

See HUSBAND AND WIFE.

1. Though an assignment be in its nature calculated to delay creditors, and therefore voidable, yet, if a creditor take a dividend under it, he cannot afterwards question its validity. *Adlum v. Yard*, 163
2. The lapse of seventeen years, without corroborating circumstances, is too short a time to raise a legal pre-

sumption, that the objects for which an assignment was made for the benefit of creditors, had either been accomplished or abandoned, . *Ibid.*

3. If an assignment be made for the benefit of such creditors as shall execute a release within a given time, one to whom a debt is actually due, and who releases within the time, but afterwards takes up notes drawn and indorsed by him for the accommodation of the assignor, is not entitled to a dividend of his estate upon the notes thus taken up. *Stoddart v. Allen*, 258

ASSIZE OF NUISANCE.

1. A writ of *habere facias seisinam*, is not the proper form of execution in an assize of nuisance. *Barnet v. Ihrre*, 44
2. It seems, that a *distringas* to compel the defendant himself to abate the nuisance, is the proper writ, . *Ibid.*
3. An execution, for costs not allowed by law, may be reversed on a writ of error, *Ibid.*
4. What costs are allowable, and what are not, in an assize of nuisance, *Ibid.*

ATTACHMENT, FOREIGN.

If, on the trial of a *scire facias* against a garnishee in a foreign attachment, the plaintiff read the answers of the defendant to the interrogatories exhibited to him on the part of the plaintiff, he may, notwithstanding, contradict those answers, by showing, that the defendant swore differently on another occasion. *Adlum v. Yard*, 163

AWARD.

See ARBITRATORS.

BILL OF LADING.

See STOPPAGE IN TRANSITU.

The master of a vessel arriving at the port of Philadelphia from a foreign port, is not bound, by the bill of lading, to deliver the goods personally, to the consignee. The liability of the ship owner ceases when the goods are landed at the usual wharf. *Cope and others v. Cordova*, . . 203

BOND.

See SET-OFF, 1.

A bond in which the obligors declare themselves to be jointly held and firmly bound to the obligee, in the sum of, &c., to which payment they bind themselves, their heirs, executors, and administrators, and every of them, is a joint, and not a joint and several bond. *Moser v. Libenguth and another, Administrators of Libenguth*, 255

CERTIORARI.

1. On a *certiorari*, from this court to the Orphans' Court, to remove the record, the original record must be returned. *Torr's Appeal*, 76
2. A writ of error, and not a *certiorari*, is the proper remedy for the correction of errors in the Court of Common Pleas, in a case brought into that court on a *certiorari*, to remove the proceedings of two aldermen, or justices of the peace, under the act of the 6th of April, 1802, "to enable purchasers at sheriff's or coroner's sales to obtain possession." *Cooke v. Reinhart*, 317
3. But after the lapse of two terms, it is too late to move to quash the *certiorari*, *Ibid*.

CHARGE.

See WILL, 1, 2.

CHOSE IN ACTION.

See HUSBAND AND WIFE.

CIRCUIT COURT.

A writ of error does not lie to the Circuit Court. *Wike v. Lightner*, 289

CONSIGNOR AND CONSIGNEE.

See STOPPAGE IN TRANSITU. BILL OF LADING.

CONSTITUTION.

The act of the 29th of March, 1819, supplementary to the act of the 2d April, 1811, incorporating the Union Canal Company of Pennsylvania, does not

violate the 10th section of the 1st article of the Constitution of the United States. *Ehrenzeller v. The Union Canal Company*, 181

COSTS.

See ASSIZE OF NUISANCE, 3, 4.

1. Where the plaintiff removed the cause to the Circuit Court, and recovered less than one hundred dollars, and offered no evidence to prove a demand exceeding five hundred dollars, and it was apparent that under the circumstances of the case none could be offered, the court ordered the plaintiff to pay the costs. *Roop v. Brubacker*, 304
2. Where the plaintiff, suing before a magistrate, has a judgment given against him, from which he appeals, and the cause being then arbitrated, an award is given in favour of the plaintiff, for which the defendant appeals, and on the trial in court, a verdict is given in favour of the defendant; the defendant is entitled to the costs of the arbitration, and also, to the subsequent costs in court. *Gonzalus v. Liggitt*, 426

COURT.

See EJECTMENT, 6. FRAUD, 1.

1. It is the duty of the court to answer fully the points upon which they are requested by counsel to charge the jury. But it is not necessary that they should answer the propositions submitted, in the very words of the propositions. It is enough if the answers be sufficiently full to be understood. *Geiger v. Welsh and others*, 349
2. Nor is it necessary, where the same proposition is repeated, though in different words, to answer every repetition of it. One full answer is enough, *Ibid*.
3. Where it is alleged, that the transcript returned to the Common Pleas, does not conform to the justice's docket, which is alleged to be erroneous, and an application is made for leave to amend the docket by the transcript, the court below are to determine, upon inspection of the docket, and all the papers and evidence before them, what are the true

- words of the record; and if they refuse the amendment, this court will not, for that reason, reverse the judgment. *Caldwell v Thompson*, . 370
4. A court, in submitting presumptive evidence to the jury, may give its opinion on the weight of the testimony, but cannot preclude the jury from deciding for themselves. *Williams, Executor of Pennock, v. Carr and another*, 420
5. The party who requests an opinion from the court, on the effect of testimony, cannot assign for error a compliance with his request, . . . *Ibid.*

COURT OF APPEAL.

See MILITIA.

COVENANT.

See ACTION, 2, 3, 6, 7. MARRIAGE SETTLEMENT.

1. Where, in a deed conveying land and reserving a rent charge, the grantor covenants, upon the grantee paying, within seven years, a gross sum, together with all arrearages, &c., to release and discharge the rent, the grantee cannot, after the lapse of eighteen years from the time prescribed in the deed, call upon the grantor to perform his covenant. *Shoemaker's Petition*, 89
2. The covenants raised by the words grant, bargain, and sell, by force of the act of Assembly of the 28th of May, 1715, are not applicable alone to deeds executed, but extend to articles of agreement for the conveyance of land. *Seizinger, Administrator of Strohecker, v. Weaver, Administrator of Grant*, 377
3. The words grant, bargain, and sell, do not create a covenant of special warranty, running with the land and broken only by eviction. The act intended to give to the vendee the benefit of two distinct covenants; a covenant of seisin as regards defeasibility from the acts of the vendor, and a covenant for quiet enjoyment against disturbance by the vendor, and those claiming under him; and the covenant of seisin is broken by the existence of an incumbrance created by the vendor, the instant it is sealed and delivered, . . . *Ibid.*
4. The previous sale of part of the land by articles of agreement, is an in-

cumbrance on the legal estate, which renders it defeasible in the hands of the subsequent vendee, who may, therefore, maintain an action to recover back the purchase-money, *Ibid.*

5. Where A. entered into articles of agreement to convey lands to B., who paid a small portion of the purchase-money, after which A. died, without having executed a conveyance, but leaving a will, by which he empowered his executors to sell for the payment of debts and education of children, and B. took no steps to have the title completed, but C., B.'s father-in-law, and D. his father, paid the residue of the purchase-money, and received from the executors of A. a conveyance for the land, which they afterwards divided between them: held, that a suit could not be maintained upon the covenants created by the words grant, bargain, and sell, in the agreement, in the name of B. for the use of C., to recover back part of the purchase-money, in consequence of the existence of an incumbrance previously created by A., by which the title of C. to part of the land was defeated. Nor can B. in such an action, recover back that part of the purchase-money which he had paid to the testator, *Ibid.*
6. The presumption of law is, that the acceptance of a deed in pursuance of articles of agreement, is satisfaction of all previous covenants; and, although there may be cases in which such acceptance is but a part execution of the contract, yet, to rebut the legal presumption, the intention to the contrary must be clear and manifest, *Ibid.*

DAMAGES.

1. In an action for overflowing the plaintiff's land, by the erection of a dam on the land of the defendant, in which the nature and extent of the alleged injury are specially described in the declaration, the plaintiff is entitled to a verdict for nominal damages, though he fail to prove the particular injury complained of, or any other actual injury. *Pastorius v. Fisher*, 27
2. An injury to the grantor's mill-race, is an injury to his mill, for which he

is entitled to damages. *Butz v. Ihrie*, 218

DECLARATION.

See DEMURRER.

DEED.

See COVENANT, 2. PURCHASER, 2, 3.

DEFALCATION.

See SET-OFF.

DEMURRER.

If the plaintiff omit in his declaration, to aver a fact essential to his recovery, and the defendant demur to the declaration, the plaintiff cannot introduce into his joinder in demurrer, an averment of such fact. The proper course, is to ask leave to amend the declaration; which, if the court grant, they will at the same time permit the defendant to withdraw or insist on his demurrer. *Gibson v. Todd, Administrator of Beale*, 452

DEMURRER TO EVIDENCE.

See PARTNERS, 1.

1. Though, on a demurrer to evidence, judgment will not be given if the declaration set forth an illegal cause of action, or no cause of action, yet it waives all objections merely formal; and what would be cured by a verdict, is cured by a demurrer to evidence. *Caldwell, Administrator of Caldwell, surviving partner of Holmes, v. Stileman*, 212
2. Where there is a demurrer to parol evidence, of a fact, which is not evidence of any other fact, but itself a substantive ingredient of the case, a party may be required to join in demurrer. *Crawford v. Jackson*, . . . 427
3. On a demurrer to parol evidence, if the plaintiff refuses to join in demurrer, except on terms which the court disapproves, the plaintiff's evidence must be considered as withdrawn, and the jury must find a verdict for the defendant, . . . *Ibid.*

DEPUTY SURVEYOR.

See EVIDENCE, 8, 9.

DISCONTINUANCE.

1. A power of attorney to the prothonotary to discontinue a suit, cannot be executed by his clerk. *The Mechanics' Bank v. Fisher*, 341
2. A plaintiff will not be permitted to discontinue, where it will give him an advantage, or tend to vex and oppress the defendant, *Ibid.*
3. Therefore, where the plaintiff, residing in Philadelphia, brought suit in Dauphin county, and the defendant took out a rule of arbitration, and went to Philadelphia to serve it on the plaintiff, who immediately sent a power of attorney to the prothonotary of Dauphin county to discontinue the suit there, and sued the defendant again in Philadelphia, notwithstanding which, arbitrators were appointed in Dauphin county, who proceeded to make an award in favour of the defendant; against which proceedings, the attorney of the plaintiff protested, and applied to the judge of the Circuit Court to set them aside, who did so: held, on an appeal, that the discontinuance was improper, and the proceedings subsequent to it valid, *Ibid.*

DISTRESS.

See LANDLORD AND TENANT, 4, 5, 7, 9.

DISTRINGAS.

See ASSIZE OF NUISANCE, 2.

EJECTMENT.

See HEIR. LEASE. SHERIFF'S SALE, 3. WITNESS, 4.

1. Though the conditions of sale are not essential to support an ejectment by the sheriff's vendee, yet being part of the *res gesta*, they are admissible in evidence. *Arnold and another v. Gorr and another*, 223
2. An undisturbed possession of twenty-four years before bringing the action, is sufficient to enable the plaintiff to recover in ejectment. *Innis and others v. Campbell and others*, . . . 373

3. An ejectment may be commenced on a strict, legal title, and the plaintiff may rebut a countervailing equity, set up by the defendant, on the trial, *Ibid.*
4. If incumbrances exist, they may be valued and allowed for by the jury, *Ibid.*
5. The court inclined to think, that paupers supported by the township, might unite with the overseers of the poor in an ejectment; but at any rate refused to grant a new trial on that ground. *Ripple and others v. Ripple and others*, 386
6. The admission of a party claiming right to defend in ejectment as landlord, under the ninth section of the act of the 21st of March, 1772, is an act of the court, whose duty it is to inquire before making the order, whether the applicant really stands in the relation of landlord, or whether his claim of title is consistent with the possession of the occupier. *M'Clay v. Benedict*, . 424

ERROR.

See ASSIZE OF NUISANCE, 3.
COURT.

ESTOPPEL.

See SHERIFF, 3.

1. There is no estoppel but between the parties to a deed. *Langer v. Felton*, 141
2. Those who take an estate under a defective conveyance, are estopped from denying its validity. *Ripple and others v. Ripple and others*, . . . 386

EVIDENCE.

See ARBITRATORS. ATTACHMENT, FOREIGN. COURT, 4, 5. EJECTMENT, 1. LIMITATION, ACT OF, 2. LANDLORD AND TENANT, 9. MILITIA, 2, 3. WITNESS.

1. An exemplification of a deed dated the 23d of June, 1696, acknowledged in open court on the 4th of August, 1696, and recorded the 27th of October, 1740, held, to be admissible in evidence, the original deed having been lost. *Duffield and others v. Brindley and others*, 91
2. An entry made by a clerk in a book

of a bank, of a deposit made by a customer, immediately before an entry made by him of the same deposit, in the customer's bank book, and supported by the oath of the clerk, is evidence to go to the jury, together with the customer's book and the testimony of the clerk. *The Farmers' and Mechanics' Bank v. Boeraef*, 152

3. An ancient deed which has not accompanied the possession, is not admissible in evidence without proof of its execution. *Arnold and another v. Gorr and another*, 223
4. The record of a judgment, sheriff's sale thereon, sheriff's deed, and mesne conveyances to the party offering them, are not evidence, where no interest in the land sold by the sheriff, is shown in the defendant in the judgment, *Ibid.*
5. In an action on a recognisance entered into in partition, in which the plea is a release, and the replication, that the release was without consideration, fraudulent, and void, evidence is not admissible under the replication, to show that though the release was expressed to be for a full consideration, none was paid; and that, to induce the releasors to execute the instrument, the releasee artfully and fraudulently represented, that if they would execute it he would pay them afterwards, and that the administrators of the releasee retained in their hands money to meet the claim of the releasors. *The Commonwealth, for the use of Mishey and others, v. Brenneman and another, Administrators of Brenneman*, 311
6. Nor is evidence admissible to show, (where third persons are interested,) that the release was induced by the purchaser of the share of one of the heirs refusing to pay without a release from all the heirs: That they agreed to meet his wishes, upon his paying only the purchase-money of the share he had bought. That there was an understanding among the heirs, that the release was to operate only in favour of the purchaser; and that among themselves, though absolute in form, it was to remain inoperative until those who took the land at the appraisement, paid to each of the heirs their share of the valuation money, *Ibid.*

7. On a general allegation of misrepresentation and fraud, a party may be compelled to specify the evidence on which he relies to establish fraud, *Ibid.*
8. Though the acts of a deputy surveyor, done for the benefit of A., cannot be given in evidence by him, in support of his own claim, without producing the authority under which the deputy acted, yet the unauthorized act of the deputy, done, or attempted by the procurement of A. may be given in evidence by B. to show the invalidity of A.'s title. *Unger v. Wiggins*, 331
9. Where a book, purporting to be a book of a deputy surveyor, containing his field notes of a resurvey, had been frequently in evidence before the court, and three times in the very cause under trial, without any question, and no proof of handwriting was called for, but it was objected to on other grounds; held, that it was not error to permit it to be read to the jury, without proof that it was the book of the deputy surveyor, or of his handwriting, *Ibid.*
10. Where the question was upon the validity of a judgment entered under a warrant of attorney upon a bond given by a father to his son, soon after the son became of age, and when the father was about to become insolvent, the alleged consideration of which was, services rendered by the son to the father: held, that it was competent to the creditors of the father, (on the application of whom the judgment had been opened, for the purpose of letting them into a defence,) to show, that on a sale by the sheriff of the father's goods, the son had claimed, and retained as his own property, a number of the articles levied on. *Reitenbach v. Reitenbach*, 362
11. A combination between the father and the son, to defraud the creditors of the father having been proved; held, that it was competent to the creditors to give in evidence declarations by the father, in the absence of the son, that the bond was given for the sole purpose of keeping off creditors, and that it was without consideration, *Ibid.*
12. The laws of another state, a member of the Union, are to be proved as

- the laws of a foreign country. *Ripple and others v. Ripple and others*, 386
13. The maxim *omnia presumuntur rite esse acta*, is as applicable to judicial proceedings in such a state, as to those in our own, *Ibid.*
14. Where a *feri facias* has lain in the sheriff's hands six years, and is then returned *nulla bona*, such return will not preclude the admission of evidence to contradict it. *Williams, Executor of Pennock, v. Carr and another*, 420
15. A book, made up by transcribing entries, made by a journeyman on a slate, some of them being transcribed by the journeyman, and some by the party, some on the same evening, and others several days afterwards, but all within two weeks, is not admissible in evidence as a book of original entries, supported by the oath of the party. *Kessler v. M'Conachy*, 435
16. After evidence of a fraudulent combination, the declarations of any one of the parties to it, may be proved. *Wilbur v. Strickland*, . . 458

EXECUTION.

See ASSIZE OF NUISANCE, 1, 2, 3.
SHERIFF, 1.

An order, given by an execution creditor to the sheriff, to stay all further proceedings on his execution, at his risk, until further directions, is a waiver of his priority, in favour of a second execution, received by the sheriff during the continuance of the stay. *Eberle v. Mayer*, . . 366

EXECUTORS.

See ACTION, 5. AGREEMENT. HEIR.

FEES.

See ARBITRATION.

1. A prothonotary, who has received one thousand five hundred dollars for each year he was in office, is bound to account for and pay over to the commonwealth, fifty per cent. upon all fees earned while he was in office, and received by his successor, and paid over to him after he has gone out of office. *Commonwealth v. West*, 29
2. But the sureties in his official bond,

are not liable in case of his omission to account for, and pay over the amount due to the commonwealth, upon the fees thus received, . *Ibid.*

FEME COVERT.

A feme covert is, in respect to her separate estate, to be deemed a feme sole only to the extent of the power clearly given by the instrument by which the estate is settled, and has no right of disposition beyond it. *Lancaster v. Dolan*, 231

FIERI FACIAS.

See EVIDENCE, 14.

FOREIGN ATTACHMENT.

See ATTACHMENT, FOREIGN.

FOREIGN COUNTRY, LAWS OF.

See EVIDENCE, 12, 13.

FRAUD.

See ASSIGNMENT, 1. EVIDENCE, 5, 6, 7, 10, 11. LEASE. PURCHASE, 2, 3. WITNESS, 1.

1. To the following propositions:—1 That a conveyance, made with a view to defeat creditors, is fraudulent and void; 2. That a debtor cannot give his property to his children to the injury of his creditors; 3. That a debtor cannot provide for the maintenance of himself and his wife out of his property to the injury of his creditors, and every instrument of writing, or conveyance, for such purpose, is void as to creditors; 4. That if the jury were of opinion, that the debtor had conveyed his property to his children for the purpose of preventing his creditors from levying upon it, the conveyance is fraudulent and void as to creditors; 5. That if the conveyance of the debtor to his children was, in the opinion of the jury, for the purpose of preventing his creditors from levying on the premises, the plaintiff (who was a purchaser under a judgment against the debtor, and brought ejectment to recover the premises,) was entitled to recover in this suit—

it is not sufficient for the court to answer, "That no act, whatever, done to defraud a creditor, or creditors, shall be of any effect against such creditor or creditors." *Geiger v. Welsh and others*, 349

2. If a deed be made by a parent to his children, on condition, that the grantees shall support the grantor for life, the consideration is a good and honest one between the parties themselves; but, if it be made with a view to hinder or defeat creditors, it is fraudulent and void as respects them, *Ibid.*

GUARDIAN AND WARD.

Where, under the circumstances, it was manifestly for the benefit of the ward, at the time, to convert his personal into real estate, and even to expend money in the improvement of the real estate, a guardian was held to be justifiable in so doing, although subsequent and unexpected events rendered the measure injurious to the ward. *Case of Bonsall's Appeal*, 266

HEIR.

If a naked power to sell be given to executors, the land in the meantime descends to the heir, and an ejectment may be brought for it in his name. *Brown v. Dysinger and another*, 408

HUSBAND AND WIFE.

1. An assignment by a husband of his wife's choses in action, as a collateral security, does not deprive her of the right of survivorship, in case he dies before they are reduced to possession. *Hartman v. Dowdel*, 279
2. An action on a judgment obtained by husband and wife, for a debt due to the husband in his own right, should, after the death of the husband, be brought in the name of the wife, as surviving plaintiff, and not in the name of the administrator of the husband. But the court will protect the rights of creditors, and others, who are shown to be equitably interested in the judgment. *Gibson v. Todd, Administrator of Beale*, 452

3. An agreement by the defendant, with the husband in his lifetime, to give him credit in a larger debt, which he had against him, is, if executed, an extinguishment of the judgment; and if not executed, it is not a reduction of the judgment into possession, by the husband, . . . *Ibid.*

INCUMBRANCE.

See COVENANT, 4, 5. EJECTMENT, 4.

INDICTMENT.

1. An indictment is not vitiated by stating an offence to have been committed on the first March instead of the first day of March. *Simmons v. The Commonwealth*, 142
2. In an indictment for fornication and bastardy, an omission to state the sex of the child, is fatal, . . . *Ibid.*

INSURANCE.

1. The disappointment of a reasonable hope of obtaining a cargo for the owner of the vessel himself, at the port to which she is sailing, with specie on board to purchase a cargo, but where no cargo has been purchased, nor a positive contract made for the purchase of one, does not authorize a recovery on a valued policy on freight, where the ship is lost on the voyage to the port of destination. *Adams v. The Pennsylvania Insurance Company*, 97
2. It seems, that a gaming policy is not good in Pennsylvania, *Ibid.*

JOINT DEBTOR.

See RELEASE.

JUDGMENT.

See HUSBAND AND WIFE, 2, 3. LEGACY, 2. PROTHONOTARY, 1. SET-OFF, 2.

1. By recovering a judgment in trespass for carrying away the plaintiff's goods, his property in the goods is divested. Consequently, such a judgment is a bar to an action of *indebitatus assumpsit*, against any one, for the proceeds of the sale of the goods which were the subject of the trespass. *Floyd v. Brown, Administrator of Truxton*, 121

2. The possession of money by the sheriff, arising from the sale of lands, sufficient to satisfy a judgment earlier than that under which the sale was made, is not *per se*, a satisfaction of such earlier judgment. The prior judgment creditor may waive his priority in favour of a subsequent one, without working an extinguishment of his judgment, which may be satisfied out of any other land originally bound by it. And, if the subsequent judgment creditor become the assignee of the first judgment, he succeeds to all the rights of the assignor. *Bank of Pennsylvania, for the use of Echelman and another, v. Winger and another, with notice, &c.*, 295

JUSTICE OF THE PEACE.

See APPEAL. COURT, 3. LANDLORD AND TENANT, 2. RESTITUTION.

LANDLORD AND TENANT.

See EJECTMENT, 6.

1. To entitle a landlord to demand from his tenant security for the payment of three months' rent, or a surrender of the possession of the premises, under the act of the 25th of March, 1825, it is not sufficient that the tenant has removed part of his goods, without leaving sufficient to secure the payment of three months' rent, while he himself remains in possession of the premises. *Freytag v. Anderson*, 73
2. To give the justices jurisdiction under this act, the removal of the lessee is necessary, *Ibid.*
3. The property of a stranger found upon the demised premises is liable to distress by the landlord. *Kessler v. M'Conachy*, 435
4. In a replevin by the stranger, he cannot call the tenant as a witness to prove no rent was due, . . . *Ibid.*
5. The exemption of a stove, belonging to the tenant, from distress, under the act of the 29th of March, 1821, is confined to that which is used in his family, and does not extend to one in his shop, apart from his dwelling-house, *Ibid.*
6. Informalities in an avowry for rent in arrear, are cured by going on to trial, *Ibid.*

7. If, on the issue of no rent in arrear, the jury find for the defendant, but omit to find the value of the goods, judgment of *retorno habendo* may be entered, *Ibid.*
8. Eviction of the tenant by the landlord, has no operation on rent already due: it suspends the rent of the month, quarter, or other portion of time running on at the time of eviction, *Ibid.*
9. If, after a distress, made on the goods of a stranger, the tenant obtains a judgment of a justice of the peace in his favour, in a proceeding under the act of the 20th of March, 1810, to compel the landlord to defalcate the tenant's just account, the stranger, having taken out a writ of replevin, may use this judgment as *prima facie* evidence on the issue of no rent in arrear, *Ibid.*

LEASE.

A lease, unfairly obtained from a party in possession of the land, will not prevent the lessee from contesting the title of the lessor. *Brown v. Dysinger and another*, 408

LEGACY.

1. Testator directed his real estate to be sold by his executors, and that when sold and the money collected, they should pay all his just debts and all the just debts of his son L., contracted up to the date of the will, but none that he might contract after the date. He then directed that his wife should have and enjoy all his estate, real and personal, during her life, and that at her death, one moiety should be left at her own disposal. The other moiety he directed to be put out at interest for the use and benefit of his son L., for him to receive the interest of the same annually during his natural life; and at his decease, the principal and interest of the same, to be at his own disposal. The wife survived the testator and died intestate. The son L. survived his father and mother, and died intestate, leaving the plaintiff, his only child:
Held, that after the death of the widow, without appointment, one half of the estate vested absolutely in the son

L. as next of kin, and was liable to his debts; and that as to the other half, it went to the son L. for life, and after his death, without appointment, to the plaintiff as next of kin of the testator, and was not liable to the debts of the testator's son L. *Thomas v. Thomas, Executor of Thomas*, 112

2. Where several legacies are charged upon land, which is sold under a judgment obtained by one of the legatees, but proves insufficient to pay all the legacies, the legatee who instituted the first suit, and obtained the first judgment and execution, gains no preference thereby; but the proceeds must be distributed *pro rata* among all the legatees. *Otty and Wife v. Ferguson, Executor of Shuey*, 294

LEGATEE.

See WITNESS, 5.

LEVARI FACIAS.

See SHERIFF, 2.

LEVY.

See SHERIFF'S SALE 2.

LIMITATIONS, ACT OF.

1. The act of March 27th, 1713, for the limitation of actions, is not a bar to the recovery of rent reserved by indenture. *Davis v. Shoemaker*, . 135
2. Under the plea of *nil debet* to a declaration stating a demise generally, the defendant may give the statute of limitations in evidence. (*Semble*), *Ibid.*

MARRIAGE SETTLEMENT.

See FEME COVERT. POWER.

1. A. and B., in contemplation of marriage, executed a deed, by which a large real estate, being the wife's share and proportion of her late father's real estate, was conveyed to trustees upon certain trusts for her benefit, and in reference to a considerable personal property, "being her share of the personal estate of her late father;" the husband covenanted, that all the purchases of real estate he might make, with the above men-

tioned personal property of the wife, which should come to his hands during the intended marriage, should be vested in the wife, subject to certain powers in the husband; and that if, at the time of her decease, he should be in possession of any of the personal property of the wife, received from the estate of her late father, not contracted to be laid out in real estate, he would account to the trustees for the principal thereof; it being understood that he should not be accountable for the interest or rent of any such moneys or estates as might come into his hands during their joint lives.

On the day before the execution of the settlement, a part of the real estate was sold; part of the purchase-money was paid, and bonds given by the purchaser for the residue, which were paid off after the marriage, but no alteration was made in the deed in consequence of the sale.

The husband, after the marriage, received considerable sums of money from the executors of the wife's father, part of which consisted of interest which had become due to that estate after the date of the marriage settlement.

Part of the wife's personal estate was laid out by the husband in the purchase of vacant lots, which were conveyed as directed by the settlement, and he expended considerable sums of money in filling up these lots, and curbing and paving in front of them.

After the wife's death, the executors of the surviving trustee brought an action of covenant upon the settlement, against the husband; and it was held,

That the proceeds of the real estate sold before the execution of the settlement, did not pass to the trustees, in the place of the land itself.

That the husband was not bound by his covenant, to account to the trustees for the proceeds of the sale.

That he was not bound to account for moneys received from the executors of the wife's father, in the shape of interest which had accrued subsequently to the date of the settlement; and that he was entitled to credit for the expense of filling up vacant lots purchased in pursuance of the settlement, and for curbing and

paving in front of them. *Biddle's Executors v. Ash*, 78

MILITIA.

1. The officer who executes a warrant for the collection of militia fines, is not bound to know that the person on whom he is directed to execute it is an exempt. *Fox v. Wood*, . . 143
2. If the minutes of the proceedings of a Court of Appeals are lost, the substance of their contents may be proved. Consequently, a warrant proved to have been copied from the return of a Court of Appeals and compared with it, is competent evidence to be left to the jury, . *Ibid*.
3. To show that a Court of Appeals was regularly constituted, it is necessary to produce the commission of the officer, by whose order it was constituted, and those of the officers who composed it, *Ibid*.

MORTGAGE.

See POWER. SHERIFF, 2.

The interest of a mortgagee, whether the mortgage be equitable or legal, cannot be taken in execution. *Rickert v. Madeira*, 325

MORTGAGEE.

See PURCHASER, 1. MORTGAGE.

NOTICE.

See PROMISSORY NOTE, 2. PURCHASER, 3. WILL, 2.

NUISANCE.

See DAMAGES, 1.

OFFICIAL BOND.

See FEES, 2. PROTHONOTARY, 2, 3.

OFFICER.

1. The secretary of the Union Canal Company of Pennsylvania, incorporated by the act of the 2d of April, 1811, was such an officer, within the meaning of the supplemental act of the 29th of March, 1819, as the legislature intended should receive no salary until the works were actually

recommended upon the canal. *Ehrenzeller v. The Union Canal Company*, 181

2. Such an officer can claim no compensation for services, upon a *quantum meruit*, *Ibid.*

ORPHANS' COURT.

See CERTIORARI, 1. ADMINISTRATION ACCOUNT.

PAROL EVIDENCE.

See DEMURRER TO EVIDENCE, 2, 3.

1. Parol evidence is not admissible to prove the reservation of a right of way, which is not reserved by or noticed in the deed. *Collam v. Harker*, 108
2. Parol evidence of declarations, made by a purchaser at sheriff's sale, that he was bidding for another, is admissible to establish a trust for the person for whom the purchaser declared he was bidding. *Brown v. Dysinger*, 408

PARTNERS.

1. Though in an action against the representatives of a deceased partner, the insolvency of the surviving partner be not satisfactorily proved, yet if it be sworn to, and the defendant demur to the evidence, it must be taken as proved. *Caldwell, Administrator of Caldwell, surviving partner of Holmes v. Stileman*, 212
2. If a contract be made with a firm, to do a certain piece of work, which is not finished until after the death of one of the partners, the estate of that partner is liable, provided the surviving partner be insolvent, *Ibid.*

PAUPERS.

See EJECTMENT, 5.

PAYMENT.

See PLEADING, 2.

PHILADELPHIA BANK.

See PROMISSORY NOTE, 3.

PLEADING.

See LIMITATIONS, ACT OF. LANDLORD AND TENANT, 6.

1. In an action of debt for rent reserved by indenture, the plaintiff may state

in his declaration the substance of the demise, and is not bound to declare upon the deed; and, if to such a declaration the defendant pleads *nil habuit in tenementis*; *actio non accrevit infra sex annos*, or any plea which is *prima facie* a good plea, no estoppel appearing on the record, the plaintiff may reply that the lease was by indenture, and such a replication will not be a departure. *Davis v. Shoemaker*, 135

2. The plea of payment, with leave, &c., does not admit the truth of all the averments in the *narr*, or statement. It admits nothing but the execution of the instrument on which the suit is founded, and what is admitted by the general issue in every action. It is a special or general defence, as the notice given under it makes it one or the other. *Roop v. Brubacker*, 304

POWER.

See HEIR.

A power to appoint by any writing in the nature of a will or other instrument, under hand and seal, executed in the presence of two credible witnesses, is well executed by a mortgage, though it contain no reference to the power. *Lancaster v. Dolan*, 231

POWER OF ATTORNEY.

See DISCONTINUANCE, 1

PRACTICE.

See CERTIORARI. LANDLORD AND TENANT, 6.

PRESUMPTION.

See ASSIGNMENT, 2. COVENANT, 6.

1. The lapse of twenty-four years, though without proof of inquiry, or other circumstances, is sufficient to warrant the presumption of the death of a person of whom nothing has been heard for that length of time. *Innis and others v. Campbell and others*, 373
2. Not having been heard of for seven years is sufficient to rebut the presumption of life, *Ibid.*

PROMISSORY NOTE.

1. When a promissory note is payable at a particular place, such as a bank, and on a particular day, and the indorsee is at the bank until it closes, at the usual hour, on the day on which the note falls due, ready to receive payment, no further demand on the drawer is necessary, in order to charge the indorser. *Rahm, Executor of Kapp, v. The Philadelphia Bank*, 335
2. Verbal notice to the indorser, of non-payment by the drawer is sufficient, *Ibid.*
3. The act of assembly incorporating the Philadelphia Bank, by the terms of which, notes discounted by that bank, are placed on the same footing as foreign bills of exchange, does not render a protest and notice thereof to the indorser necessary, in order to charge him, *Ibid.*

PROTEST.

See PROMISSORY NOTE, 3.

PROTHONOTARY.

See FEES, 1, 2.

1. A prothonotary complies, substantially, with the directions of the act of assembly of the 24th of February, 1806, when, in entering judgment on a bond with warrant of attorney, upon the application of the party, he enters on his docket the names of the obligor and obligee, in the form of an action, as parties; the date of the bond and warrant of attorney; the penal sum; the real debt; the time of entering the judgment, and the date of the judgment on the margin of the record. *The Commonwealth, for the use of Black, v. Conard and another*, 249
2. An omission by the prothonotary to enter on the record a stay of execution provided for in the warrant of attorney, is not such a neglect of duty or mistake in the prothonotary, as will work a forfeiture of his official bond, and make him liable to the party for the amount due upon his judgment, *Ibid.*
3. A prothonotary who wilfully neglects any duty is liable upon his official bond to any one who may be thereby injured, *Ibid.*

PUBLIC ACCOUNTS.

See TREASURER. SUPERVISORS, 4.

PURCHASER.

See ACTION, 6. CERTIORARI, 2. PAROL EVIDENCE, 2. SHERIFF'S SALE, 1, 2, 3. WILL, 1, 2.

1. A mortgagee is a purchaser within the intent of the Stat. 27 Eliz. ch. 4. *Lancaster v. Dolan*, 231
2. In Pennsylvania a voluntary conveyance is not void against a subsequent purchaser, by force of the Stat. 27 Eliz. ch. 4, *Ibid.*
3. Under the act of assembly of the 18th of March, 1775, a voluntary deed, duly recorded, is as valid against a subsequent purchaser, as a deed for a valuable consideration, provided it be untainted by actual fraud, *Ibid.*
4. In a proceeding under the act of 6th of April, 1802, to obtain possession of land purchased at sheriff's sale, if the inquest find that A. B. was the defendant whose land was sold; that he was in possession at the time, and that the purchaser gave notice to him, and to C. D. and E. F., his tenants, it is a sufficient finding of the possession of the debtor, and that those who are said to be his tenants, came into possession under him. *Cooke v. Reinhart*, 317
5. It is enough if the inquest find, that the purchaser gave due and legal notice, without expressly finding, that three months' notice was given prior to the application to the justices, *Ibid.*

QUANTUM MERUIT.

See OFFICER, 2.

RECEIPT.

See RELEASE.

RECORD.

See COURT, 3. SHERIFF'S SALE, 4.

RECORDING ACT.

See PURCHASER, 3.

RELEASE.

See ADMINISTRATION ACCOUNT, 3.
EVIDENCE, 5, 6.

A receipt, not under seal, to one of several joint debtors, for his proportion of the debt, discharges the rest. *Milliken and another v. Brown*, . 391

RENT.

See LANDLORD AND TENANT.

RENT CHARGE.

See ACTION, 6, 7. COVENANT. SHERIFF'S SALE, 2.

REPLEVIN.

See LANDLORD AND TENANT, 3, 4, 5, 6, 7.

RE-RESTITUTION.

Where this court reversed the judgment of the Court of Common Pleas, who had reversed the proceedings of two justices, under the act of the 6th of April, 1802, and awarded restitution of the land to the defendants, a writ of re-restitution to the complainants was awarded. *Cooke v. Reinhart*, 317

RESERVATION.

1. Time does not begin to run against a privilege reserved in a deed, until some default, negligence, or acquiescence is shown, or may be fairly presumed, in the party in whose favour such reservation is made. *Butz v. Ihrie*, 218
2. Therefore, a reservation of a right for the grantor, his heirs and assigns, to raise, swell and dam the water of a stream, from a dam intended to be built on his own land, provided the same is not raised or swelled so high as to injure and damage the mill granted by the deed, is not barred, forfeited, or lost by the lapse of thirty-two years, from the time the right was reserved, to the time of building the dam in pursuance of that right, *Ibid*.
3. Though the words of the deed be "a dam," &c., yet the substance or the reservation is of a privilege to overflow the land, without injuring the grantor's mill; and whether this

be done by one dam or by more than one, is not essential. *Ibid*.

RIGHT OF WAY.

See PAROL EVIDENCE, 1.

SALARY.

See OFFICER.

SET-OFF.

1. The assignee of the assignee of a bond, takes it subject to all the equities existing at the time of the assignment, between the obligor and the first assignee, notwithstanding such equities may have arisen before the bond came into the hands of the first assignee. *Metzgar, for the use of Uhler and another, v. Metzgar*, 227
2. A judgment may be set off before a jury, against a demand not ascertained by judgment, *Ibid*.
3. Mutual demands extinguish each other by operation of law, without actual defalcation by the act of the parties. *Commonwealth v. Clarkson, Administrator of Passmore*, . . . 291
4. Therefore, where a prothonotary and a sheriff received fees for each other during their continuance in office, the fees received by the prothonotary for the sheriff, against which he was entitled to set-off money received by the sheriff for him, were held to have been fees received by the prothonotary while in office, and liable to taxation under the act of the 10th of March, 1810, although no actual settlement of accounts took place between them until long after the prothonotary had gone out of office, *Ibid*.
5. An agent of a corporation, who has received money for its use, cannot, in an action for money had and received, brought against him by the corporation, prove, by way of set-off, that he has paid the debts of the corporation, without showing a special authority for that purpose. And it is not enough to prove, that the defendant acted for the treasurer, without showing some resolution of the board, giving the treasurer a right to delegate his power to the defendant. *Middletown and Harrisburg Turnpike Road Company v. Watson, Administratrix of Watson*, 330

SHERIFF.

See JUDGMENT, 2.

1. If the sheriff misapply money that comes into his hands, by paying one execution, with the proceeds of property sold under another, the party who receives the money, is not bound, provided he has acted fairly, to refund it, either to the sheriff or to the party whose money has been improperly paid away. It is not necessary, on receiving a payment from the sheriff, to inquire out of what fund it is made. *Diechman, Administrator of Smull, v. The Northampton Bank*, 54
2. The sheriff is not justified in selling, under a *levari facias*, grain growing on the mortgaged premises. And if he does so, the party to whom the grain belongs, may maintain an action of trespass *quare clausum fregit* against the sheriff, though not in actual possession of the land. *Myers and another, Assignees of Myers, v. White*, 353
3. Such party is not estopped from contesting the validity of the sale, in consequence of having received from the sheriff the balance in his hands, after payment of the mortgage, *Ibid*
4. A sheriff is answerable for the conduct of his deputy in taking goods of another person than the defendant, in execution. *Wilbur v. Strickland*, 458

SHERIFF'S DEED.

See SHERIFF'S SALE, 1.

A difference between the sheriff's deed, and the levy, *venditioni exponas*, and conditions of sale, in stating the number of acres contained in a tract of land, is unimportant. *Arnold and another v. Gorr and another*, . . 223

SHERIFF'S SALE.

See CERTIORARI, 2. EVIDENCE, 4. EJECTMENT, 1. PAROL EVIDENCE, 2. PURCHASER, 2, 3. SHERIFF'S DEED. SHERIFF.

1. It is no objection to the validity of the title of a purchaser at sheriff's sale, that the *venditioni exponas* was not returned until long after the acknowledgment of the sheriff's deed, and long after the sheriff who made

the sale, had gone out of office. *Smull v. Mickle and another*, . . 95

2. Generally, the levy on real estate will control all the subsequent proceedings. Therefore, if the levy be upon a rent charge and the *renditioni exponas, alias venditioni exponas, &c.*, command the sheriff to sell the rent charge, but headvertised the lot upon which it is charged, and make a deed to the purchaser, purporting to convey the lot, and no application be made to set aside the sale at the proper time, by those authorized to object to it, the rent charge passes to the purchaser. *Streaper v. Fisher and others*, 155
3. A defendant whose property has been sold by the sheriff, cannot defeat the purchaser in obtaining possession, by connecting himself with one who may have a good title. *Arnold and another v. Gorr and another*, 223
4. A judgment was confessed before a justice of the peace on the 11th of August, 1823, for a sum exceeding one hundred dollars. A transcript of this judgment was filed in the Court of Common Pleas, on the 20th of the same month. The plaintiff afterwards took out an execution from the justice, which was returned—"No goods could be found to satisfy the demand;" a certificate to which effect was carried to the prothonotary's office, together with a *præcipe* for a *fiery facias*, on the 7th of April, 1824. The prothonotary, instead of filing this certificate with the transcript already filed, filed and docketed it, as a new transcript, and marked the execution as having issued upon it: Held, that all these proceedings must be taken together, as constituting one whole, and that, therefore, they were regular. But if they were not so, they could not be inquired into collaterally, the remedy being, if any error actually existed, by motion to the Common Pleas, before the sheriff's deed is acknowledged; and it makes no difference whether the purchaser at sheriff's sale is the plaintiff in the execution or a stranger, . . . *Ibid*.

STOPPAGE IN TRANSITU.

If goods are shipped on credit, in a foreign port, on board the consignee's

own ship, the master of which signs a bill of lading, by which they are to be delivered to his owner, the *transitus* is at an end by delivery to the master; and the consignor cannot afterwards stop the goods, in case of the insolvency of the consignee before their arrival. *Bolin and others v. Huffleagle, Consignee, &c.*, 9

SUPERCARGO.

See ACTION, 1.

SUPERVISORS.

1. A suit cannot be maintained by the supervisors of the roads, after they have gone out of office, against the county treasurer, upon an order drawn on him by the commissioners, in favour of the supervisors, or their successors in office. *Willard v. Parker and another*, 448
2. It seems, however, that if the supervisors had worked upon the roads, to the amount of the order, or had paid others for their labour, they might have acquired such an interest in the order as would have enabled them to sustain a suit for their own use, *Ibid.*
3. Where the treasurer has received money due for road taxes, he is bound to pay it to the supervisors; and has no right to make payments in county orders, *Ibid.*
4. The mode of proceeding, on the part of the supervisors, pointed out by the fourth section of the act of the 6th of April, 1802, prescribing the manner of settling their accounts, must be strictly pursued, . . *Ibid.*

SURETY.

See FEES, 2.

TENDER.

1. A tender of money in behalf of an infant, made by his uncle, the father being dead, but the mother living; held to be good, although the uncle had not then been appointed guardian. *Brown v. Dysinger and another*, 408
2. A tender, partly in silver coin, and partly in bank notes, offered to be converted into silver, but the oppo-

site party refusing to accept any money, held to be good, . . . *Ibid.*

TIME.

See ASSIGNMENT, 1. COVENANT RESERVATION, 1, 2.

TREASURER.

See SUPERVISORS, 1, 2, 3.

Under the provisions of the act of the 30th of March, 1811, to amend and consolidate the several acts relating to the settlement of public accounts, &c., it is not necessary that an account should be revised and examined by the state treasurer in person. It may be done by deputy. *Commonwealth v. Aurand*, 282

TRESPASS.

See JUDGMENT. SHERIFF, 2.

TRUST.

See PAROL EVIDENCE, 2.

TRUSTEE.

See ACTION, 4, 5.

UNION CANAL COMPANY.

See OFFICER, 1, 2. CONSTITUTION.

USURY.

See WITNESS, 3.

VENDITIONI EXPONAS.

See SHERIFF'S SALE.

VOLUNTARY DEED.

See PURCHASER, 2, 3.

WAGER.

1. No wager concerning any human being, is recoverable in a Court of Justice. *Phillips v. Ives*, 36
2. Therefore, a wager, whether or not Napoleon Bonaparte, would, within a specified time, be removed or escape from the island of St. Helena, was held to be illegal and void, *Ibid.*

WAGER POLICY.

See INSURANCE, 2.

WAIVER.

See EXECUTION.

WARRANT AND SURVEY.

1. It seems, that the ninth section of the act of the 8th of April, 1785, requiring that survey should be made after the warrants are delivered to the deputy surveyor, is not confined to the purchase made of the Indians in 1784. *Barton and others v. Smith*, 403
2. Independently, however, of legislative enactment, a survey made previously to a warrant, is void; and is not rendered valid by the receipt of the purchase-money and acceptance of the survey, *Ibid.*

WILL.

See LEGACY. WITNESS, 5.

1. Although land devised is not expressly charged with the maintenance of infirm children of the testator, yet, if such an intention can be clearly collected from all the parts of the will, considered in reference to the testator's circumstances, the charge will attach upon the land, and follow it into the hands of subsequent purchasers. *Ripple and others v. Ripple and others*, . . . 386
2. What is sufficient notice of such a charge to affect subsequent purchasers, *Ibid.*
3. The words "any earthly property," in a will, if they appear from the context not to have been intended to include real estate, will be confined to personal property. *Brown v. Dysinger and another*, . . . 408

WITNESS.

1. A party to a fraud is competent to prove it. *Langer v. Felton*, . . 141

2. In an action against the indorser of a promissory note, the drawer, to whom the defendant has executed a release, is not incompetent as a witness for the defendant, on the ground of interest, though he has given to the indorser a judgment and mortgage, to secure him against the indorsements. *Griffith v. Reford*, 196
3. But he is incompetent, (on the ground that a witness cannot impeach a writing he has given,) to prove that the consideration of the note was usurious; that the indorsee was in fact the lender, and that the security was put into a negotiable form, merely for the sake of convenience, *Ibid.*
4. Where it did not appear how long the defendant in an ejectment had been in possession of the land in dispute, a lessee of the plaintiff, under an old lease, who had probably been out of possession twenty years or more, and against whom no suit had been brought, was held, in the absence of further evidence to presume liability for mesne profits, not to be incompetent as a witness for the plaintiff, on the ground of interest, *Unger v. Wiggins*, 331
5. A legatee who has assigned his interest under the will to another person, is a competent witness to prove the will, although the consideration of the assignment is a bond for a given sum, payable to him at a future day. *M'Ilroy and another v. M'Ilroy and another*, 433

WRIT OF ERROR.

See CIRCUIT COURT. CERTIORARI, 2, 3.

No writ of error lies to the opening of a judgment to the court below. It is a matter depending on the sound discretion of that court, who are not prevented by lapse of time, from affording relief. *Kalbach, for the use of Reber, v. Fisher*, 323



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